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In the

Supreme Court of the United States

OCTOBER TERM, 1998

TED HERRING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court — in conflict with the United States Court of Appeals for the Second, Third, Fourth, and District of Columbia Circuits — erred in excluding evidence of trial performance in determining whether a death penalty defendant's attorney "actively represented conflicting interests" within the meaning of this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

2. Whether the Florida Supreme Court correctly held — in direct conflict with this Court's decisions in *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Sochor v. Florida*, 504 U.S. 527 (1992) — that it could vacate an aggravating circumstance and impose the death penalty without either reweighing the evidence or conducting a harmless error analysis.

LIST OF PARTIES

Petitioner Ted Herring is the only party seeking review of the judgment below.

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Ted Herring ("Herring") respectfully petitions this Court for a writ of certiorari to review the September 24, 1998 and May 2, 1991 decisions of the Florida Supreme Court in this case, upholding the denial of Herring's Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

OPINIONS AND ORDERS BELOW

The judgment and sentence of the Volusia County, Florida trial court, entered on March 1, 1982, is reproduced in the Appendix at 1. The findings of the trial judge with respect to aggravating and mitigating circumstances, entered on March 1, 1982, are reproduced in the Appendix at 3. The decision of the Florida Supreme Court affirming Herring's conviction and death sentence is reported as *Herring v. State,* 446 So. 2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984), reproduced in the Appendix at 9. The decision of the Florida Supreme Court striking down an invalid aggravating circumstance, but upholding Herring's death sentence, is reported as *Herring v. State*, 580 So. 2d 135 (Fla. 1991), reproduced in the Appendix at 25. The decision of the Florida Supreme Court upholding the denial of Herring's 3.850 Motion to Vacate Judgment and Sentence is reported as *Herring v. State*, ___ So. 2d ___ (Sept. 24, 1998), reproduced in the Appendix at 34. The order of the Florida Circuit Court denying Herring's 3.850 Motion to Vacate Judgment and Sentence, entered on January 31, 1997, is reproduced in the Appendix at A-47.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. Petitioner seeks a writ of certiorari to review two decisions of the Florida Supreme Court pursuant to this Court's Rule 12.4. The 1991 decision of the Florida Supreme Court was entered on May 2, 1991, and the court denied rehearing on June 12, 1991. The 1998 decision of the Florida Supreme Court was entered on September 24, 1998, and the court denied rehearing on January 14, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition is concerned with the interpretation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

A. The 7-Eleven Shooting

Early on May 29, 1981, a 7-Eleven store clerk in Daytona Beach, Florida, was shot twice and killed during a robbery. On the morning of June 12, 1981, petitioner Ted Herring was arrested on an unrelated charge. Under interrogation, he confessed to the robbery and homicide at the 7-Eleven store as well as to several other similar convenience store robberies during the same time period. *Herring v. State*, 446 So. 2d 1049, 1051-52 (Fla.), *cert. denied*, 469 U.S. 989 (1984). The confession was tape-recorded. *Id.* Herring stated that he entered the 7-Eleven store early on the morning of May 29 and, after requesting a pack of cigarettes, drew a gun and demanded money. *Id.* The clerk then made a sudden move, which caused

Herring to panic and shoot. 1982 Supp. R.O.A. at 127.[1] The shooting was not intentional and was certainly not planned — in the course of four other similar armed robberies during the same time period to which Herring confessed, he had never fired his gun or harmed anyone. 1982 Supp. R.O.A. at 103-09. Herring stated in his taped confession: "I shot him, you know, by mistake, but I meant to just put the gun to his head not for it to go off." 1982 R.O.A., Vol. II, at 75.

At trial, Detective Dozell Varner, one of the three detectives who interrogated Herring on June 12, 1981, testified that in an untaped portion of Herring's interrogation, Herring told him that he shot the 7-Eleven clerk a second time to eliminate him as a witness. That single piece of uncorroborated testimony condemned Herring to death. On the basis of that testimony alone, the trial judge found the "avoidance of arrest" aggravating circumstance applicable and imposed the death penalty. Other Florida Supreme Court decisions involving similar murders made clear that without Varner's testimony, the "avoidance of arrest" aggravator could not have been applied,

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1. "1996 R.O.A." refers to the Record on Appeal from the decision on Herring's motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 following an evidentiary hearing held November 25-27, 1996 before the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida (the "Circuit Court"). "1996 Tr." refers to the transcript of that hearing, which is part of the 1996 R.O.A. (in the Record on Appeal designated by the Florida Supreme Court, the transcript of the November 1996 hearing was separately paginated). "1992 Master R.O.A." refers to the Record on Appeal for the consolidated appeal of eight defendants, including Herring, from a joint 3.850 hearing held December 15-18, 1992. "1992 R.O.A." refers to the Record on Appeal from that hearing specific to Herring. "1992 Supp. R.O.A." refers to the supplement to the 1992 R.O.A. (At the November, 1996 hearing, the Circuit Court admitted into evidence the portions of the 1992 Master R.O.A., 1992 R.O.A., and 1992 Supp. R.O.A. germane to Herring's case. 1996 Tr. 121-127). "1990 R.O.A." refers to the Record on Appeal from the Circuit Court's summary denial of Herring's amended 3.850 motion, dated February 16, 1989. "1982 R.O.A." refers to the Record on Appeal for Herring's 1982 direct appeal to the Florida Supreme Court. "1982 Supp. R.O.A." refers to the supplement to the 1982 R.O.A.

and a death sentence would not have been imposed.[2] Varner's testimony was contradicted by (i) Herring's taped confession, which includes no such admission; (ii) the testimony of the other two detectives who interrogated Herring and who did not hear Herring mention anything about eliminating a witness; and (iii) the physical evidence in Herring's case, including the ballistics evidence which demonstrated that the two shots were fired in rapid succession. All the evidence in Herring's case, with the exception of Varner's testimony, demonstrated that the clerk was shot reflexively in a "robbery gone bad."

At the time of Herring's trial, Detective Varner's disciplinary record included 25 instances of misconduct, including reprimands for poor judgment, poor performance, failure to honor a subpoena, and failure to follow directions. *App.* at 44; Exh. 23, 1996 R.O.A. at 528-30.[3] The former Chief of Police under whom Varner served testified that Varner was not "criminal investigation material" and that his record was not that of "a first-rate policeman." 1996 Tr. at 339; 1992 Master R.O.A. at 516, 518. At the time of Herring's trial, Varner was

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2. *See, e.g., Caruthers v. State*, 465 So. 2d 496 (Fla. 1985) (Florida Supreme Court vacated death sentence where convenience store clerk was shot under circumstances virtually identical to those in Herring's case, but there was no testimony on par with Varner's testimony); *Griffin v. State*, 474 So. 2d 777, 781 (Fla. 1985) (same); *Robertson v. State*, 611 So. 2d 1228, 1232 (Fla. 1993) (defendant's testimony that victim saw him clearly was insufficient to establish avoidance of arrest aggravator since "[t]he facts indicate that [the defendant] shot [the victim] instinctively and without a plan to eliminate her as a witness"); *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997) (Florida Supreme Court struck down "avoidance of arrest" aggravator and reversed death sentence where defendant shot clerk *five times* — three times, then twice again at close range after clerk had collapsed on the floor — because there was insufficient evidence to support a finding that murder was committed to avoid arrest).

3. Citations in the form "Exh. ___" refer to the exhibits offered in evidence at the November 25-27, 1996 hearing, which are part of the 1996 R.O.A. The exhibits with numerical designations were admitted by the Circuit Court, and those with alphabetical designations were excluded by the Circuit Court.

himself a suspect in a criminal investigation for grand theft in which Varner's wife, Wendy, was arrested. 1996 Tr. at 329, 350, 359; 1992 Master R.O.A. at 493-99; Exh. 27, 1996 R.O.A. at 1004. The arrest of Wendy Varner and the investigation of Dozell Varner gave Varner a motive to color or embellish the testimony regarding Herring's alleged untaped statements concerning the "witness elimination" motive. 1996 Tr. at 404; 1992 Master R.O.A. at 562-63.

B. Defense Counsel's Ties To Law Enforcement

Howard B. Pearl, an Assistant Public Defender, was appointed as Herring's trial counsel. Unbeknownst to Herring, Pearl was at that time a Special Deputy Sheriff in Marion County, a neighboring county. Pearl never informed his clients of his status as Special Deputy Sheriff because he believed that it was "none of their business" and they probably would have refused to be represented by him had they known. 1996 Tr. at 57, 198; 1992 Master R.O.A. at 304-05, 886-87; Teffeteller Exh. 2, 1996 R.O.A. at 523-24.

At the time of Herring's trial, Pearl needed to serve as Special Deputy to be allowed to carry firearms, which was of vital importance to him: Pearl testified that he felt "naked, incomplete, lonesome" without a firearm, and conceded that he could only carry a firearm through his appointment as Special Deputy. 1996 Tr. at 36, 49-54; 1992 Master R.O.A. at 171, 188-89, 284-85, 288-89, 299-301. Pearl served at the Sheriff's pleasure, and his appointment could be revoked in the Sheriff's sole discretion. 1996 Tr. at 49-50; 1992 Master R.O.A. at 171, 188-89, 288-89. The Marion County Sheriff indeed testified that he had in his discretion revoked the Special Deputy status of "quite a few people." 1996 Tr. at 277-88.

Pearl also conceded that an appointment as Special Deputy in Volusia County (where the trial occurred) would have created a conflict of interest. 1996 Tr. at 63; 1992 Master R.O.A. at 431, 979. He admitted that the duties of law

enforcement officers in Marion and Volusia were "crossover duties involving the jurisdiction to arrest outside of the city limits." 1996 Tr. at 188. He also conceded that he could not meaningfully distinguish his Marion County appointment, admitting that his status did not change when he crossed the county line. 1992 Master R.O.A. at 431, 979; 1996 Tr. at 63.

C. Pearl's Deficient Performance At Trial and Herring's Death Sentence

At trial, Pearl did not challenge Varner's testimony. His cross-examination consumes a mere two pages of the trial transcript. 1982 Supp. R.O.A. at 553-54. He only asked Varner whether Herring was offered food and rest while in custody. 1982 Supp. R.O.A. at 553-54; 1992 Master R.O.A. at 332. He later conceded that Varner's testimony "cut [Herring's] throat" and provided "the blueprint for [the] statutory aggravating circumstances" and the imposition of the death penalty. 1992 Master R.O.A. at 370. Pearl also did not challenge the testimony of the other law enforcement witnesses who testified at Herring's trial.

Pearl not only failed to challenge Varner; he bolstered the credibility of the police witnesses by arguing in summation that the community was "fortunate to have men like that serving the community as law enforcement officers." 1982 Supp. R.O.A. at 688.

Pearl never argued to the jury that the shooting was accidental or reflexive, which was consistent not only with Herring's taped confession, but also with the ballistics evidence. Instead, he allowed Herring (who had only an IQ of 80, indicating borderline mental retardation) to testify that, after Herring had begun the hold-up, another man entered into the 7-Eleven and shot the clerk. This patently incredible strategy did not require Pearl to challenge the testimony of any law enforcement witness. 1996 Tr. at 191, 194; 1992 Master R.O.A. at 399.

After a three-day trial, the jury returned a verdict of guilty and recommended death by an eight-to-four vote. 1982 R.O.A., Vol. I, at 70-72. The trial judge followed the jury's recommendation and sentenced Herring to death. 1982 R.O.A., Vol. I, at 73-77. The trial judge found the following four aggravating circumstances present:

> (1) That the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;
>
> (2) That the crime was committed while he was engaged in the commission of the crime of robbery;
>
> (3) That the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (the "avoidance of arrest" aggravator); and
>
> (4) That the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (the "heightened premeditation" aggravator).
>
> 1982 R.O.A., Vol. I, at 73-74; Exh. 18-BB, 1996 R.O.A. at 493-95; *App.* at 4-5.

In mitigation, the court found two circumstances: (1) Herring's age at the time of the crime (19); and (2) Herring's difficult childhood, i.e., that he was raised essentially without a father, that he was hyperactive, that he had learning disabilities, and that he had trouble in school. 1982 R.O.A., Vol. I, at 76; Exh. 18-BB, 1996 R.O.A. at 493-95; *App.* at 7. In his statements at sentencing, the trial judge based his findings of the third and fourth statutory aggravators *exclusively* on Varner's testimony. 1982 R.O.A., Vol. I, at 74; Exh. 18-BB, 1996 R.O.A. at 493-95; *App.* at 4-6.

D. Post-Conviction Proceedings

Herring appealed to the Florida Supreme Court, which affirmed his conviction and sentence on February 2, 1984. *App.* at 9.[4]

On March 9, 1989, Herring filed a Motion to Vacate Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, asserting that the decision in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988), which expressly overruled the application of the "heightened premeditation" aggravating circumstance in Herring's case, required the vacation of Herring's death sentence. That motion was later amended to add a claim based upon Pearl's newly discovered and undisclosed conflict of interest. On May 25, 1989, the trial court denied relief under *Rogers*, and on November 5, 1989, the trial court summarily denied the Pearl claim.

On appeal, the Florida Supreme Court vacated the heightened premeditation aggravating factor. *App.* at 30. The Court nevertheless found that the elimination of this aggravating factor did not compromise the weighing process of either the judge or the jury and refused to grant a new sentencing hearing. *App.* at 31. Two Justices of the Florida Supreme Court dissented in part, stating that the case required "at the very least, a new sentencing hearing," and that they were

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4. In April 1985, Herring filed a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The Florida circuit court denied the motion, and the Florida Supreme Court affirmed in December 1986. *Herring v. State*, 501 So. 2d 1279 (Fla. 1986). In March 1987, Herring filed a Petition for Writ of Habeas Corpus pursuant to Rule 9.030(a)(3) of the Rules of Appellate Procedure in the Florida Supreme Court. In June 1988, the Florida Supreme Court denied relief. *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988). In September 1988, Herring filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida, which was dismissed without prejudice and on consent in February 1989. *Herring v. Dugger*, Case No. 88-791-CIV-ORL-18 (M.D. Fla. Feb. 16, 1989).

"dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law." *App.* at 33. The court then remanded the case to the circuit court for an evidentiary hearing "to determine whether [Pearl's] service as a special deputy sheriff affected his ability to provide effective legal assistance." *App.* at 32.

An evidentiary hearing on Pearl's conflict of interest in Herring's case was held on November 25-27, 1996 (the "November 1996 hearing").[5] Herring established that Pearl needed to remain in the good graces of law enforcement to retain his Special Deputy status, which was of vital importance to him at the time of Herring's trial. Herring also adduced overwhelming evidence of Pearl's deficient performance at Herring's trial. On January 31, 1997, the circuit court denied Herring's 3.850 motion. *App.* at 48. The court concluded that Pearl never acted as a law enforcement officer, and that his status as a Special Deputy Sheriff did not create a conflict. *App.* at 55.

On September 24, 1998, the Florida Supreme Court affirmed the trial court's ruling. *App.* at 34. In conducting the conflict of interest analysis required by *Cuyler*, the Florida Supreme Court refused to consider any evidence of Pearl's deficient performance at trial as relevant to the actual conflict inquiry and focused exclusively on Pearl's status as Special Deputy. Thus, the Court failed to recognize that in cases where the conflict results from counsel's personal interest, evidence of counsel's performance at trial may be the best, and perhaps the only, evidence that counsel "actively represented conflicting interests." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Finding that Pearl's Special Deputy status involved no law enforcement responsibilities, and not considering Pearl's

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5. An earlier evidentiary hearing was held on December 15-18, 1992. The result of that hearing was vacated by the Florida Supreme Court due to procedural irregularities. *Teffeteller v. Dugger (Herring v. State)*, 676 So. 2d 369 (Fla. 1996) (per curiam).

performance at trial to be relevant, the court held that Herring could not demonstrate an actual conflict under *Cuyler*. Having found that there was no actual conflict, the court declined to engage in an analysis of adverse effect, and therefore did not consider Pearl's trial performance at all. *App.* at 42. Herring's rehearing petition was denied on January 14, 1999.

REASONS FOR GRANTING THE PETITION

Herring's petition should be granted for two reasons. First, this case demonstrates that this Court should resolve the conflict as to the standard for determining what constitutes an actual conflict under *Cuyler v. Sullivan* where the conflict alleged by the defendant arises from defense counsel's own personal interest. A defendant demonstrates that counsel labored under a disqualifying conflict of interest where counsel (i) had an actual conflict of interest, and (ii) the conflict adversely affected his representation of the defendant. *Cuyler*, 446 U.S. at 335. The *Cuyler* standard for determining actual conflict is that counsel "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350.

The majority of courts applying this standard in cases where the alleged conflict arises from counsel's personal interests have recognized that this inquiry requires evaluation of counsel's trial performance. Thus, the Second, Third, Fourth, and D.C. Circuits have evaluated defense counsel's performance at trial in analyzing actual conflict. Without evaluating what counsel did or failed to do at trial, a court seeking to determine whether counsel actively represented his personal interest to the detriment of his client's interest would be — and, in this case, was — reduced to speculating about counsel's subjective state of mind at trial.

In clear conflict with the majority, the Florida Supreme Court in Herring's case focused its analysis exclusively on Pearl's status. Had the Florida Supreme Court recognized that evidence of actual conflict often overlaps with adverse affect, as have the Second, Third, Fourth, and D.C. Circuits, it would have found overwhelming evidence of conflict. Without this Court's resolving this conflict, there is nothing to prevent the recurrence of untenable results like the one in this case.

Second, Herring's petition should be granted because the Florida Supreme Court violated the Eighth and Fourteenth Amendments by upholding Herring's death sentence even though that sentence resulted from an invalid aggravating circumstance. As this Court has explicitly held, where a state Supreme Court reviews a death sentence affected by an invalid aggravating circumstance, the court must remand for a new sentencing hearing, independently reweigh the aggravating and mitigating circumstances, or make an individualized determination, based on the particular facts of the case, that the error was harmless. The Florida Supreme Court did none of these, stating merely that the elimination of the invalid aggravating circumstance did not "compromise the weighing process of either the judge or the jury."

I. THE FLORIDA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF NUMEROUS OTHER COURTS AND DEMONSTRATES UNCERTAINTY IN THE LOWER COURTS IN THE APPLICATION OF *CUYLER v. SULLIVAN*

A. The Second, Third, Fourth, and D.C. Circuits Have Recognized That Defense Counsel's Performance At Trial Is Highly Relevant In Determining Whether Counsel's Personal Interest Constitutes An Actual Conflict Under *Cuyler*

In rejecting Herring's claim, the Florida Supreme Court addressed only one issue: Pearl's status as a Special Deputy Sheriff. Because it found that Pearl performed no law enforcement duties, it concluded that no conflict existed. It thus expressly declined to address any aspect of Pearl's performance at trial, including his inexplicable failure to challenge Varner's testimony. The Florida Supreme Court's application of the *Cuyler* standard conflicts directly with decisions of the D.C., Second, Third, Fourth, and D.C. Circuits, all of which have held that counsel's performance at trial is highly relevant in performing a *Cuyler* analysis of actual conflict in cases like this one.

In *United States v. Tatum*, 943 F.2d 370, 375-77 (4th Cir. 1991), for example, the Fourth Circuit held that actual conflict and adverse effect under *Cuyler* "are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F. 2d at 375. The reason for this, of course, is that the very same deficient trial performance that is evidence of adverse effect will also establish "active representation" of conflicting interests that constitutes an actual conflict under *Cuyler*. Thus, the *Tatum* court held that an actual conflict exists where defense counsel has "substantial personal interests which conflict with the clear objective of his representation of the client," and counsel fails to cross-examine a prosecution witness whose testimony is

material to the defense. *Id.* at 376. Such failure to cross-examine also will demonstrate adverse effect under *Cuyler* because counsel's failure "can be considered to be [an] actual lapse[ ] in the defense." *Id.*

Similarly, in *United States v. Taylor*, 139 F.3d 924 (D.C. Cir. 1998), the defendant claimed that he had pleaded guilty in large part because "his trial counsel failed to advise him of a viable advice of counsel defense . . . ." *Id.* at 932. The D.C. Circuit held that if counsel's failure to so advise defendant was due to counsel's personal interest in not raising as an issue the accuracy of his advice, then this could be in actual conflict with the defendant's interest in knowing all viable defenses. *Id.* at 933. *See also Strouse v. Leonardo*, 928 F.2d 548, 553 (2d Cir. 1991) (actual conflict analysis required trial court to determine whether counsel actively sought appointment as defendant's executor, which would establish the actual conflict: "it is not enough in determining the existence of an actual conflict of interest merely to assess the attorney's state of mind"); *Government of Virgin Islands v. Zepp.*, 748 F.2d 125, 137-38 (3d Cir. 1984) (defense counsel's performance amounted to a "total abandonment of the loyalty which counsel owes his client" and established counsel's actual conflict under *Cuyler*); *United States ex. rel. Duncan v. O'Leary*, 806 F.2d 1307, 1309-1310 (7th Cir. 1986) (noting state trial court's recognition that trial performance of defense counsel who was prosecutor's campaign manager could establish actual conflict, and that effective waiver of actual conflict before trial required an evaluation of how counsel's personal interest might affect his performance at trial).

B. *Herring* Clearly Conflicts With The Analysis Of Actual Conflict Conducted By The Second, Third, Fourth, and D.C. Circuits

In Herring's case, the Florida Supreme Court expressly excluded evidence of Pearl's deficient performance at trial from its analysis of actual conflict under *Cuyler*. *App.* at 42. The Florida Supreme Court focused its inquiry solely on whether Pearl's Special Deputy status made him a law enforcement officer. *App.* at 39-42. Concluding that it did not, the Court summarily upheld the trial court's finding that the record revealed "no evidence . . . that Mr. Pearl was actively representing conflicting interests." *App.* at 41-42. Having compartmentalized its analysis of actual conflict, which it concluded did not exist, the Florida Supreme Court did not consider adverse effect. *App.* at 42. Accordingly, even though Pearl's deficient trial performance was carefully tailored to further his personal interest in carrying a firearm and thus was in actual conflict with and adversely affected his representation of Herring, the Florida Supreme Court excluded evidence of Pearl's performance from its *Cuyler* analysis.

Had the Florida Supreme Court examined Pearl's performance at trial, and recognized that the evidence was relevant to both the actual conflict and adverse effect prongs of the inquiry, it would have found that the *Cuyler* standard was satisfied. First, Pearl admitted that carrying a firearm was of vital importance to him, and that at the time of Herring's trial he could only do so as special deputy. 1996 Tr. at 36; 1992 Master R.O.A. at 284-85, 288-89, 299-301. Second, Pearl admitted that he could only retain his status if he remained in the good graces of law enforcement. 1996 Tr. at 49-50; 1992 Master R.O.A. at 171, 188-89, 288-89. Third, Pearl acknowledged that he never informed his clients that he was a Special Deputy because they would have perceived the conflict of interest and fired him. 1992 Master R.O.A. at 886-87; Teffeteller Exh. 2, 1996 R.O.A. at 523-24. Fourth, Pearl admitted that it would have been improper to have been a Special Deputy in Volusia County and conceded that nothing

changed when he crossed the Marion County line on his way home from work each evening. 1996 Tr. at 63; 1992 Master R.O.A. at 431, 979. Fifth, Pearl admitted that the defense he adopted in Herring's case was utterly incredible. 1996 Tr. at 191, 194; 1992 Master R.O.A. at 399. Finally, Pearl could not explain why he failed to impeach Varner, whose testimony was both uncorroborated and highly vulnerable to impeachment, even though he conceded that Varner's testimony provided "the blueprint" for the death penalty. 1996 Tr. at 93, 94, 95, 98, 107, 113, 114-18, 127, 142, 147-48; 1992 Master R.O.A. at 332, 346-47, 358, 361, 367-68, 379-80, 387-88, 389-91.

Although Pearl's trial performance seriously compromised Herring's interests and all but assured the imposition of a death sentence, the Florida Supreme Court concluded that it was under no obligation to consider any aspect of his performance. It thus plainly misconstrued *Cuyler*. This Court should grant *certiorari* to resolve the conflict on the proper reading of *Cuyler* and to prevent further such misconstructions.

II. IN UPHOLDING HERRING'S SENTENCE DESPITE THE ELIMINATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE, THE FLORIDA SUPREME COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

A. This Court Has Set Forth Two Alternative Analyses That A State Supreme Court Must Conduct In Upholding A Death Sentence Affected By An Invalid Aggravating Circumstance

The imposition of the death penalty violates the Eighth and Fourteenth Amendments where a State Supreme Court upholds a death sentence affected by an invalid aggravating circumstance without reweighing the evidence, or conducting an appropriate harmless error analysis. *Clemons v. Mississippi*, 494 U.S. 738, 750-54 (1990); *see Sochor v. Florida*, 504 U.S. 527, 532 (1992). Even if other aggravating circumstances apply to the case, affirming a sentence reached by weighing an invalid aggravating circumstance deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Sochor*, 504 U.S. at 532, (citing *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990)). To avoid an Eighth Amendment error, a State Supreme Court must remand to the trial court for resentencing, independently reweigh the aggravating and mitigating circumstances in the case, or conduct an appropriate harmless error analysis. *Hopkins v. Reeves*, 118 S. Ct. 1895, 1899 (1998); *Sochor*, 504 U.S. at 532; *Clemons*, 494 U.S. at 750-54.

Because the Court "cannot be sure that the [state] court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence," absent written evidence of the required independent reweighing, a conclusory statement to that effect will not suffice. *Clemons*,

494 U.S. at 748-52 (State Supreme Court decision vacated where decision "is virtually silent with respect to the particulars of the allegedly mitigating evidence"). Moreover, this Court has noted that the Florida Supreme Court "will generally not reweigh evidence independently." *Sochor*, 504 U.S. at 539; *see also Hudson v. State*, 538 So. 2d 829, 831 (Fla. 1989).

The alternative harmless error analysis mandated by this Court requires both a clear statement by the State Supreme Court that it is conducting a harmless error analysis *and* an individualized description of why the error is harmless. *Clemons*, 494 U.S. at 752-53; *Sochor*, 504 U.S. at 539-40. In *Sochor*, as here, the Florida Supreme Court struck the "heightened premeditation" factor, holding that there was insufficient evidence to support that aggravating circumstance. *Sochor*, 504 U.S. at 531. Using reasoning similar to that subsequently used in Herring's case, the Florida court held that:

> Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. . . . Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

Sochor, 504 U.S. at 531. This Court vacated the Florida Supreme Court's decision, holding that the court's reasoning was insufficient to demonstrate that it had engaged in a harmless error analysis that met the requirements of *Clemons*. *Sochor*, 504 U.S. at 539-40. This Court's opinion in *Sochor* held that, at a minimum, the Florida Supreme Court should have *described* that it was conducting a harmless error analysis (rather than for instance, a proportionality analysis). *Id.* The court also should have *declared* and *explained* its belief that the error was harmless beyond a reasonable doubt, and that it did

not contribute to the sentence. *Id.* at 540. Similarly, in *Clemons*, this Court held that an appropriate harmless error analysis requires an "individualized determination" based on the character of the defendant and the circumstances of the crime that the application of an invalid aggravating circumstance was harmless. *Clemons*, 494 U.S. at 752-53 (citing *Zant v. Stephens*, 462 U.S. 862 (1983) and *Barclay v. Florida*, 463 U.S. 939 (1983)).

B. In Herring's Case, The Florida Supreme Court Conducted Neither Of These Analyses

In upholding Herring's death sentence without reweighing the aggravating and mitigating circumstances and without engaging in a proper harmless error analysis as mandated by this Court, the Florida Supreme Court violated the Eighth and Fourteenth Amendments. In *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), the Florida Supreme Court held that the "heightened premeditation" aggravating circumstance required proof, beyond a reasonable doubt, of "calculation" which consists of a "careful plan or prearranged design to kill." *Rogers*, 511 So. 2d at 533. In *Rogers*, the court expressly held that the "heightened premeditation" factor no longer applied to the facts of Herring's case, where there was no evidence of such plan or design. *Id.* In 1991, the Florida Supreme Court reviewed Herring's death sentence in light of its holding in *Rogers*. The court upheld Herring's sentence, holding that:

> Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.

App. at 31.[6] This holding does not constitute either an independent reweighing of the aggravating and mitigating circumstances or an appropriate harmless error analysis.

1. The Florida Supreme Court did not reweigh the evidence

The Florida Supreme Court did not engage in an independent reweighing of the evidence; the court did not review (or even describe) any of the mitigating circumstances. Instead, the *court* simply speculated as to the trial court's weighing process without any pretense of conducting the independent reweighing required by this Court: "the result of the weighing process would not have been different had [the "heightened premeditation" factor] not been articulated as a factor in the sentencing." *App.* at 31. This is consistent with this Court's finding that the Florida Supreme Court does not normally reweigh the evidence of aggravating and mitigating circumstances. *Sochor*, 504 U.S. at 539.

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6. Herring's challenge to the 1991 decision of the Florida Supreme Court is timely. *Reece v. Georgia*, 350 U.S. 85, 86-87 (1955) (this Court has jurisdiction to review all federal questions decided in the earlier stages of the litigation by state supreme court before it remanded to trial court for further proceedings). In Herring's case, the Florida Supreme Court remanded the case to the trial court for an evidentiary hearing on Pearl's conflict, but upheld Herring's sentence. *App.* at 25. Under *Reece*, this Court has jurisdiction to review Herring's challenge to the improper upholding of his sentence regardless of whether it became the law of the case in 1991.

2. The Florida Supreme Court did not engage in a proper harmless error analysis

The Florida Supreme Court's decision in this case is in substance no different than in *Sochor*, which this Court repudiated because the Florida court's decision was unclear as to whether the court engaged in a proportionality or harmless error analysis and did not explain and declare its belief that error was harmless beyond a reasonable doubt. *Sochor*, 504 U.S. at 539-40. The same result should obtain here.

CONCLUSION

For the foregoing reasons, Ted Herring's petition for a writ of certiorari should be granted.

Dated: March 17, 1999

Respectfully submitted,

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APPENDIX

STATE OF FLORIDA, *vs.* TED HERRING, Defendant.	**IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.** CASE NO.: 81-1957-CC COUNT I

JUDGMENT AND SENTENCE

YOU, TED HERRING, being now before the Court attended by your attorneys, HOWARD PEARL and J. PEYTON QUARLES, and having had a fair trial by the jury of your countrymen and having been found Guilty of the crime of Murder in the First Degree, with a recommendation of death by the jury in a separate proceedings to consider the penalty, the Court now adjudges you to be Guilty of that offense. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing, it is the sentence of the law and such is the Judgment of the Court that you, TED HERRING, be delivered by the Sheriff of Volusia County, Florida, with a copy of this sentence forthwith, to the proper office of the Department of Corrections, and by him safely kept until by warrant of the Governor of the State of Florida, you, TED HERRING, be electrocuted until you are dead. May God have mercy on your soul.

DONE AND ORDERED in Open Court at Daytona Beach, Volusia County, Florida, this 1st day of March, 1982.

/s/ SJF

S. JAMES FOXMAN, CIRCUIT JUDGE

This sentence shall run consecutive ~~to Count II hereof and~~ to sentence imposed by this Court in Case No. 81-1749-CC.

STATE OF FLORIDA, *vs.* TED HERRING, Defendant.	**IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.** CASE NO.: 81-1957-CC

Filed in open Court
Seventh Judicial Circuit,
Volusia County, Florida

MAR 1 1982

V.Y. SMITH, CLERK

By /s/ B.R. [illegible]
Deputy Clerk

FINDINGS PURSUANT TO F. S. 921.141

I. On February 25, 1982 at Daytona Beach, Florida, the jury returned a verdict of guilty as to Murder in the First Degree and Robbery With a Firearm. On February 26, 1982 the jury returned an advisory opinion recommending imposition of the death penalty. The Defendant was sentenced to death by electrocution by this Court on March 1, 1982, and their findings are filed concurrent with sentencing. While these findings concern the application of the death penalty the Court does note with regard to the robbery sentence that there was abundant evidence to support a finding of premeditated murder. It is not a situation where

there was only evidence to support felony murder (see Mahaun vs. State, 377 So.2nd 1158 (Fla. 1979) and Hillery vs. State, 391 So.2nd 777 (4th DCA 1980).

II. Aggravating circumstances (must be established beyond a reasonable doubt)

1. The crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment. The evidence does not establish this circumstance.

2. The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person. As conceded by the defense the Defendant was convicted and sentenced by this Court in January of 1982 for an unrelated robbery with a firearm. This factor is established.

3. The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons. There is no evidence to support this circumstance.

4. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery. As conceded by the defense the murder was committed by the Defendant during the course of a robbery. This circumstance is established.

5. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The Court accepts Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did not want a witness to his crime. By his own admission the Defendant clearly established this circumstance. The case of Riley vs. State, 366 So.2nd 19 (Fla. 1979) supports the proposition that

this circumstance applies to the elimination of witnesses to a crime as well as law enforcement officers.

6. The crime for which the Defendant is to be sentenced was committed for financial gain. While the facts of the case fit this circumstance it cannot be counted because this Court already has counted as an aggravating circumstance the fact that the crime was committed during the felony of robbery.

7. The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws. The evidence does not establish this circumstance.

8. The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel. This circumstance comes close to being established. The Defendant gave no indication of any remorse during the trial. In fact, probation officer Mary White testified Defendant stated the death of Norman Dale Hoeltzel meant "one less cracker." Lack of remorse can be considered in determining this criteria (Sireci vs. State, 399 So.2nd 964 (Fla. 1981). Still this Court believes however brutal and senseless this crime is, it does not meet this extreme criteria.

9. The crime for which this Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Norman Dale Hoeltzel was shot in the side of the head at close range. The bullet first passed through his hand. While he lay on the floor wounded, but still alive, the Defendant shot him again in the neck to eliminate any possible witness. The victim was killed because he may have been a possible witness to the robbery. There is no evidence Norman Dale Hoeltzel and the Defendant knew one another or had any contact prior to the shooting. There is only some slight evidence Norman Dale Hoeltzel was making a move towards the armed Defendant. There certainly was no affray. This Court finds beyond a reasonable doubt that this murder was cold, calculated, and premeditated; and without any pretense

of moral or legal justification. This circumstance is established.

III. Mitigating circumstances (do not have to be established beyond a reasonable doubt)

1. Defendant has no prior significant history of prior criminal activity. Pursuant to Maggard vs. State, 399 So.2nd 973 (Fla. 1981) the defense conceded this mitigating circumstance did not exist; and the Court prohibited the State from playing the full confession tape which would have disclosed the Defendant's participation in several convenience store robberies. This mitigating circumstance does not exist (with the exception of the one convenience story robbery for which the Defendant was previously tried and convicted, this Court did not take into consideration the three convenience store robberies now pending before this Court.)

2. The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. The evidence does not establish this circumstance.

3. The victim was a participant in the Defendant's conduct or consented to the act. The evidence does not establish this circumstance.

4. The Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor. The evidence does not establish this circumstance.

5. The Defendant acted under extreme duress or under the substantial domination of another person. The evidence does not establish this circumstance.

6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law was substantially impaired. There was no evidence indicating Defendant was intoxicated or was operating with reduced capacity to appreciate the criminality of his conduct on May 29, 1981. In fact, the evidence strongly indicates the murder was coldly calculated to eliminate a witness. The Defendant's mother did indicate the Defendant had learning disability, was hyperactive, and had a low IQ of 80. But this Court had ample opportunity to closely observe the Defendant. He is alert, responsive, and reasonably articulate. At worst, he is of slightly below average intelligence. This mitigating factor is not established by the evidence.

7. The age of the Defendant at the time of the crime. The State and the defense indicate the Defendant was 19 at the age of the crime. Although the Florida Supreme Court has said there is no per se rule pinpointing a particular age as an automatic mitigation factor (Perry vs. State, 395 So.2nd 170 (Fla. 1981), nineteen seems to be right at the pivot point. The Defendant in Perry was 20, and yet that age was not counted as a mitigating circumstance under the facts of that case. In this case age does not seem to be a factor. After observing the Defendant closely over a period of time the Court believes the Defendant would continue the same course of criminal conduct at age 20, and beyond. Nonetheless, the Court feels the Defendant should be given the benefit of the doubt as to this mitigating factor. This mitigating factor is established but it is not a strong mitigating factor.

8. Any other aspect of the Defendant's character or record and any other circumstance of the of the offense. The Court accepts as a mitigating circumstance the fact that as Defendant had a difficult childhood (see Neary vs. State, 384 So.2nd 881 (Fla., 1980). His mother indicated the Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school.

SUMMARY

The Court finds four (4) aggravating circumstances exist; only two (2) mitigating factors have been established. This Court is aware however that the Court should go beyond mere mechanical tabulation (Brown vs. State, 381 So.2nd 690 (Fla. 1980). In this case, not only do the established aggravating factors numerically outweight the mitigating factors, but the aggravating factors are stronger and carry more weight and relevency than the mitigating factors. The Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defendant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him. Further, this Court must also give due weight to the jury's recommendation of death. After having carefully reviewed all evidence in this case and carefully reviewing the evidence in mitigation and aggravation, the Court finds imposition of the death penalty is warranted.

/s/ SJF

S. JAMES FOXMAN, CIRCUIT JUDGE
March 1, 1982

COPIES TO: Gayle Graziano, Assistant State Attorney
J. Peyton Quarles, Assistant Public Defender

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 61994.

Supreme Court of Florida.

Feb. 2, 1984.

Rehearing Denied April 11, 1984.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J. of armed robbery and first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) prospective juror, who stated he would have difficulty rendering a verdict of guilty if he knew death penalty was a possibility and who stated unequivocally that he knew of no circumstance whatsoever in which he would be able to recommend death penalty, was properly discharged for cause; (2) trial judge correctly excluded, during sentencing phase, proffered testimony concerning sentences imposed in unrelated capital cases; (3) trial judge correctly excluded from jury during sentencing phase of trial certain poems written by defendant which were offered as mitigating evidence; (4) evidence was sufficient to establish aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest; (5) evidence was sufficient to support finding of aggravating cirmcumstance that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification; (6) aggravating circumstances outweighed mitigating circumstances; and (7) imposition of death penalty was proportionately correct.

Affirmed.

Ehrlich, J., filed opinion concurring in part and dissenting in part.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Mark C. Menser, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

The appellant, Ted Herring, was convicted of armed robbery and the first-degree murder of a convenience store clerk. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence. We have jurisdiction,[1] and affirm the conviction and sentence of death.

The following are the relevant facts. Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

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[1] Art. V, § 3(b)(1), Fla. Const.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his *Miranda* rights. Herring signed a written waiver of his *Miranda* rights and was interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's.

At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Guilt Phase

The appellant's only contention of error with regard to the guilt phase of his trial is that the trial judge erred in excusing one of the prospective jurors for cause. Appellant asserts that he is entitled to a new trial because, in excusing this juror, the trial judge incorrectly applied the test for excusing death-scrupled jurors set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We disagree.

The prospective juror, during the course of the *voir dire* examination, stated that he was opposed to the imposition of the death penalty under any circumstances, and that although he could possibly change his mind, at the moment he did not know of any circumstance which would cause him to change his mind. The prospective juror's specific responses to inquiry by the court and counsel were as follows:

THE COURT: Well, you're sort of straddling a fence and you need to sort of help me out here. There's nothing wrong or right with your views. It's just we need to know where you stand; and my question to you again is, would your objections, reservations or doubts about the death penalty interfere with your ability in the first phase to objectively determine guilt or innocence?

MR. CAMERON: No.

THE COURT: All right.

MR. CAMERON: It would not.

THE COURT: Okay. Now, the second question: *If the Defendant was proven guilty beyond every reasonable doubt, could you return a verdict of guilty knowing that the death penalty was a possibility?*

MR. CAMERON: *Right now I think I could not.* I might change my mind in the middle of the trial. It's a possibility.

THE COURT: *Okay. You feel that you would refuse to impose the death penalty under any circumstance?*

MR. CAMERON: *I feel that way now.*

THE COURT: Okay.

Counsel, I'm going to open it up to question by the State and the Defense.

Ma'am?

MS. GRAZIANO: Mr. Cameron, just to make sure I understand you correctly, *the way you feel right now, there are no circumstances whatsoever that you would be able to recommend the death penalty?*

MR. CAMERON: *That's true.*

MS. GRAZIANO: I have no further questions.

MR. PEARL: Mr. Cameron, I'm Howard Pearl from the Public Defender's office. I'd like to put to you a question or give you an example which is admittedly extreme because what we're asking you about is, are there any circumstances under which you might vote in favor of the death penalty; and, let me give you an extreme example.

Imagine, if you will, that the Defendant on trial for murder were Adolph Hitler or Idi Amin who caused the cold-blooded murder and death of millions of people. If that were true and if either one of these people were found guilty of murder in the first degree, would you consider the death penalty?

MR. CAMERON: I would consider it, but I think I'd find alternatives that I would choose.

MR. PEARL: Well, you cannot choose alternatives except for two, as the Judge has instructed you. There are only two in the event of a conviction of first degree murder. One is life in prison with a minimum of 25 years before parole, and the other is death. There are no other alternatives. There are no social engineering things that you can apply. There's no way you can change the person involved, in that sense. So, all you can do is choose one of those two alternatives as a juror, and you have said that you would follow the law.

MR. CAMERON: Uh-huh.

MR. PEARL: And, therefore, I ask you under such an extreme circumstance where the person that you had on trial who was convicted of first degree murder was a person of the caliber I have named, could you then, knowing your alternatives and not being able to choose others, vote for the death penalty?

MR. CAMERON: Under emotional influence I might.

MR. PEARL: Once again, I have to clear this up for you.

Serving on a jury is not supposed to be an emotional experience. You're supposed to bring to it your common sense, your logic, your everyday business sense; and you're supposed to leave emotion aside.

MR. CAMERON: If I was able to talk and think logically, I probably would not. I'm sure I would not.

MR. PEARL: Well, could you?

MR. CAMERON: I mean, *I'm sure I would not recommend the death penalty.*

MR. PEARL: Well, you would be amongst eleven other jurors. You would be one of twelve.

MR. CAMERON: Yes.

MR. PEARL: On the one hand, would you exercise independent judgment in your thinking?

MR. CAMERON: Yes.

MR. PEARL: And, on the other, would you listen to the views and respect the views of your fellow jurors in arriving at your verdict and discuss the case?

MR. CAMERON: I would listen, yes.

MR. PEARL: Would you be receptive to logical argument with respect to the death penalty if you were to hear such logical argument and respond to it and perhaps be able to then vote in favor of it if you felt that the argument was compelling?

MR. CAMERON: I would listen to it. I would not anticipate that I would change my mind.

MR. PEARL: Well, then I think—correct me if I'm wrong—I think what you have said is, although you're opposed to it and although you're thinking now is that you would not vote for the death penalty, that, on the other hand, there are or may be circumstances under which you would, although you do not know what those circumstances might be at the present time?

MR. CAMERON: It's a possibility I could change my mind. That's true.

MR. PEARL: Thank you, sir.

THE COURT: All right, Counsel. Is there a motion?

MS. GRAZIANO: The State moves that Mr. Cameron be stricken for cause.

MR. PEARL: I oppose it, Your Honor. I believe that Mr. Cameron could—is qualified to consider the death penalty and to make a decision at the proper time.

(Emphasis added.)

As noted, at the beginning of the inquiry the prospective juror stated that, with his present feelings, if he knew the death penalty was a possibility he would have difficulty rendering a verdict of guilty. The juror unequivocally stated that he knew of no circumstance whatsoever in which he would be able to recommend the death penalty. When pressed by appellant's counsel concerning the alternatives of either a life or death sentence, and given the examples of Adolph Hitler and Idi Amin, the prospective juror responded that he might recommend the imposition of the death penalty "under emotional influence." When reminded by counsel for the appellant that he must "leave emotion aside," the prospective juror stated, "I'm sure I would not recommend the death penalty."

In footnote 21 of *Witherspoon*, the United States Supreme Court set forth a test for determining when the state may excuse a prospective juror for cause in a death penalty

case.[2] *Witherspoon* requires a trial court to determine whether or not a prospective juror is "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances. . . ." 391 U.S. at 522 n. 21, 88 S.Ct. at 1777. The United States Supreme Court reaffirmed this principle in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), where it concluded that a prospective juror may be excused for cause when his answers reveal a view toward capital punishment which would "substantially impair the performance of his duties as a juror" in the penalty phase of the trial. *Id.* at 45, 100 S.Ct. at 2526.

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[2] Footnote 21 reads as follows:

> 21. Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. *See* nn. 5 and 9, *supra*.
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case.

391 U.S. at 522-23, 88 S.Ct. at 1777.

This Court is familiar with the Eleventh Circuit Court of Appeals' recent interpretation of *Witherspoon* and *Adams* in *Witt v. Wainwright*, 714 F.2d 1069 (11th Cir.1983), which held that *Witherspoon* and *Adams* did not allow a juror to be excused for cause where the juror responded that she did not "think" that she could put aside her feelings and be an impartial juror where the death penalty was involved. Without accepting the Eleventh Circuit's construction of *Witherspoon* and *Adams*, we find that in the instant case the prospective juror did more than "think" that his views would interfere with the performance of his duty as a juror. We conclude that the prospective juror in the instant case was properly discharged for cause because the record clearly reflects that, at the time of the inquiry, the juror's views would "substantially impair the performance of his duties as a juror," *Adams*, in the penalty phase of the trial and would also affect him in making a decision in the guilt phase of the trial.

It would make a mockery of the jury selection process to rule otherwise for it would allow persons with fixed opinions to sit on juries. To permit a person to sit as a juror after he has honestly advised the court that he does not believe he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, the evidence, and the law presented to them.

Although appellant has raised no other issues with respect to the guilt phase of his trial, we have reviewed the record in this case and find that there is substantial competent evidence to support the appellant's conviction. From our examination of the record, we find no reversible errors in the guilt phase of appellant's trial.

Sentencing Phase

Herring contends that his sentence should be vacated and a new sentencing trial granted because (1) the trial court refused to allow testimony by attorneys who represented other murder defendants in similar cases who were able to obtain life sentences; (2) the trial court improperly excluded two poems written by appellant which were offered in mitigation; (3) the trial court erred in finding as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the trial court erred in finding the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner; (5) the trial court improperly used the aggravating circumstance that the murder was committed during the commission of a felony when that felony formed the underlying basis for the felony-murder conviction; and (6) Florida's capital sentencing statute is unconstitutional on its face and as applied in this case.

Appellant's points five and six merit no discussion. Both points have been considered and rejected by this Court in prior cases. *See Menendez v. State*, 419 So.2d 312 (Fla.1982); *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

As to his first contention, appellant argues that under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the trial judge should have allowed defense counsel for other first-degree murder defendants to testify that their clients received life sentences for similar crimes. The testimony sought to be presented reflects that these defendants were able to plead guilty and receive a life or lesser sentence. We have previously held that evidence concerning sentences imposed upon codefendants must be admitted in the penalty phase in order to allow the jury to know all the facts and circumstances surrounding an offense and its participants. *See Downs v. State*, 386 So.2d 788 (Fla.), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980); *Salvatore v. State*, 366 So.2d 745 (Fla.1978),

cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Messer v. State*, 330 So.2d 137 (Fla.1976), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). These cases do not hold, however, that the circumstances and sentences in other death penalty cases must be admitted in the sentencing phase of the trial. Evaluating the sentences of other defendants in unrelated crimes involves a number of variables. There is no requirement in *Lockett* for the admission of such evidence in the sentencing phase. What *Lockett* does require is the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue. 438 U.S. at 604-605 n. 12. The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant. The trial court, in determining the sentence to impose, must use its judicial experience in evaluating and weighing the aggravating and mitigating circumstances with the recommendation of the jury. The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant, but is not a matter for the jury. This Court also has the responsibility to determine whether the sentence is proportionate with other death penalty cases. In the instant case the trial judge correctly excluded from the jury the proffered testimony concerning sentences imposed in unrelated capital cases.

Appellant's second claim is that the trial judge improperly excluded certain poems written by the appellant which were offered as mitigating evidence. These poems were contained in a clinical report about the appellant. The record reflects that appellant's counsel attempted to read the poems into evidence without identifying the report or offering it into evidence or calling the person who wrote it to

testify. Under these circumstances, we find that the trial judge correctly excluded these poems from evidence.

Appellant's third point is that the trial court erred in finding the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The evidence in the record is uncontroverted that the appellant shot the clerk while he was standing behind the counter and shot him again after he had fallen to the floor. There was also testimony from a detective that appellant stated that he "shot a second time to prevent him [the clerk] from being a witness against him." This evidence is, in our view, sufficient to establish the appellant's intent to kill the store clerk in order to eliminate him as a witness.

Appellant's fourth point is that the trial judge improperly found the aggravating circumstance that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness-elimination murders. We have also held, however, that this description is not intended to be all inclusive. *See Menendez; McCray v. State*, 416 So.2d 804 (Fla.1982); *Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined in *McCray; Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and *Combs*.

The trial court did find, as mitigating circumstances in this case, that the appellant had a difficult childhood, had learning disabilities, and that he was nineteen years of age at the time of this offense. It is within the province of the trial court to decide the weight to be given particular mitigating circumstances and whether they offset the established aggravating circumstances. As we have repeatedly stated since the initial principles for reviewing death sentences were laid down in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), Florida's death penalty statute does not comprehend the mere tabulation of aggravating and mitigating circumstances to arrive at a specific result. The aggravating and mitigating circumstances must be weighed by the trial judge in imposing the appropriate sentence. This Court must then review that sentence and consider the circumstances in the light of other decisions determining whether the death penalty is appropriate. *See Menendez*. We conclude that the established aggravating circumstances outweigh the mitigating circumstances. We have affirmed the imposition of the death sentence in cases involving similar robbery-murders where the defendants were of a youthful age and lacked prior significant criminal activity. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), and *Meeks v. State*, 339 So.2d 186 (Fla.1976), *cert. denied*, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978). The mitigating circumstance of no prior significant criminal activity is not present in this case; in fact, appellant had been previously convicted of an armed robbery. From our review, the imposition of the death penalty is proportionately correct.

For the reasons expressed, we affirm appellant's conviction and the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

EHRLICH, J., concurs in part and dissents in part with an opinion.

EHRLICH, Justice, concurring in part and dissenting in part.

I concur in both the conviction and the sentence. I do not, however, agree that the record supports a finding of heightened premeditation sufficient to characterize the murder as cold, calculated and premeditated. The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, *as applied*, of Florida's death penalty statute.

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 75209.

Supreme Court of Florida.

May 2, 1991.

Rehearings Denied June 12, 1991.

Motion was filed for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied motion. Movant appealed. The Supreme Court held that: (1) Supreme Court decision in *Rogers* restricting applicability of cold, calculated, and premeditated aggravating factor in death penalty cases did not entitle movant to new sentencing hearing, and (2) due process principles required evidentiary hearing on movant's claim that his public defender's service as special deputy in adjacent jurisdiction resulted in ineffective assistance of counsel.

Remanded.

Barkett and Kogan, JJ., dissented as to Part I.

McDonald, J., dissented as to Part II and filed a concurring and dissenting opinion.

Barkett, J., filed a concurring and dissenting opinion in which Kogan, J., concurred.

Jon M. Wilson of Foley & Lardner, Van Den Berg, Gay, Burke, Wilson & Arkin, Orlando, and Jeremy G. Epstein, Dennis P. Orr, David Sorokoff and Alan S. Goudiss of Shearman & Sterling, New York City, for appellant.

Robert A. Butterworth, Atty. Gen. and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals the trial court's denial of his motion for postconviction relief under rule 3.850, Florida Rules of Criminal Procedure. The motion sets forth two claims: (1) that our decision in *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), receding from the application of the cold, calculated, and premeditated aggravating factor, as we applied it in Herring's direct appeal,[1] requires a vacation of Herring's death sentence; and (2) that Herring's trial counsel's appointment as a special deputy sheriff resulted in ineffective assistance of counsel in Herring's trial proceeding.[2] For the reasons expressed, we affirm the denial of relief on the first claim and remand to the trial court for an evidentiary hearing on the second claim.

This case has an extensive history before this Court. In 1981, Herring was charged with the murder of a convenience store clerk. We affirmed Herring's conviction for first-degree murder and his sentence of death in *Herring v. State*, 446 So.2d 1049 (Fla.1984) [*Herring I*]. The facts are detailed in that opinion. In affirming that sentence, we held that the trial judge properly found four aggravating circumstances: (1) that Herring had previously been convicted of another armed

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[1] *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[2] We have jurisdiction. Art. V, § 3(b)(1) Fla. Const.

robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner. In doing so, we expressly discussed the application of this last aggravating factor in that opinion. We also agreed with the trial judge that the following mitigating factors were present: (1) that Herring was nineteen years old at the time of the crime; (2) that he had a low intelligence quotient and learning disabilities; and (3) that he had had a difficult childhood.

In 1985, Herring filed a motion to vacate judgment and sentence under rule 3.850. The trial court denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla.1986) [*Herring II*]. Subsequently, in 1987, Herring filed a petition for writ of habeas corpus, claiming that his appellate counsel rendered ineffective assistance. This Court denied relief in *Herring v. Dugger*, 528 So.2d 1176 (Fla.1988) [*Herring III*].

In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion under rule 3.850, asserting that our decision in *Rogers* was a change in the law. The trial court denied the motion on this ground, holding:

> [T]his matter is procedurally defaulted in that it is untimely presented in violation of the filing deadline set forth in Florida Rule of Criminal Procedure 3.850 and constitutes an abuse of the writ. As noted by the Florida Supreme Court in *Eutzy v. State*, [541 So.2d 1143 (Fla.1989)], its decision in *Rogers v. State*,

511 So.2d 526, 533 (Fla.1987), restricting the applicability of the cold, calculated, and premeditated aggravating factor was *not* a fundamental change in the law which "should be given retroactive effect" but was a mere "evolutionary refinement" in the law which should not be utilized to abridge the finality of judgments.

After so holding, the trial court allowed Herring to amend his 3.850 motion to assert an additional claim regarding his trial counsel's undisclosed conflict of interest. In that claim, Herring asserted that Howard Pearl, an assistant public defender of Volusia County and chief of the capital division, who had been appointed as his trial counsel, was also serving as a special deputy sheriff in Marion County while he represented Herring. Herring contends that, although Pearl had held this position for more than fifteen years, he had never disclosed this fact to Herring. Herring claims that Pearl's undisclosed conflict of interest presumptively denied him effective assistance of counsel and entitles him to a new trial. In considering this part of the motion, the trial court denied relief without an evidentiary hearing, stating:

1. The Defendant's motion relies entirely upon the same factual assertions and legal argument presented to and rejected by this court after evidentiary hearing in *State of Florida vs. Roy Allen Harich*, Case Number 81-1894-BB; in fact, the Harich case as well as the appendices submitted in support of the Harich motion are incorporated by reference in this Defendant's motion. . . . [T]he Defendant's motion merely restates the factual allegations of Harich's motion (most of which have already been rejected by this court in its order denying relief in Harich's case) and no new factual allegations or legal argument are presented in support of the special deputy sheriff/actual conflict of interest issue first raised by Harich and now regurgitated by every capital defendant who was represented by Assistant Public Defender Howard Pearl. Accordingly, for the same

reasons outlined in this court's order denying relief in Harich and for the reasons outlined in the State's Rule 3.850 response, the instant motion is denied. . . .

2. The various substantive allegations of conflict of interest raised in the Harich petition and now duplicated by the defendant were rejected in Harich. This court's factual and legal conclusions in Harich necessarily control in this case especially given the lack of any additional factual allegations in support of his claim by the defendant. The issues presented having already been fully and fairly litigated in the Harich proceeding, and this court having already determined as a matter of fact and law that Howard Pearl was not a regular deputy sheriff but was in fact a "special" or "honorary" deputy sheriff in Marion County for the *sole* purpose of permitting him to carry a firearm and that that status did not create a conflict of interest in his position as an assistant public defender in Volusia County, the instant motion is summarily denied.

PART I

Invalid Aggravating Factor

With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla.1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla.1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

PART II

Ineffective Assistance of Counsel

With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In *Harich v. State*, 542 So.2d 980 (Fla.1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in *Harich*, the trial judge made detailed findings of fact and denied relief. We affirmed the trial judge, holding that the fact that this public defender was a special deputy in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla.1990).

The trial judge in this case concluded that it was not necessary to duplicate the evidentiary hearing regarding this issue because he had previously made factual findings on this

identical issue in *Harich*. We find that due process principles do not allow the trial judge to adopt factual findings made in a prior case involving a different defendant, even though it concerns the same issue. Herring must be afforded an opportunity to present evidence and examine and cross-examine witnesses on this issue. Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter. If other defendants raise this same claim, however, we find that it would be proper for the chief judge to consolidate the cases for one hearing on this single issue.

Accordingly, we remand this cause to the trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance. We deny relief on all other grounds.

It is so ordered.

SHAW, C.J., and OVERTON, GRIMES and McDONALD, JJ., concur as to Part I.

BARKETT and KOGAN, JJ., dissent as to Part I.

SHAW, C.J., and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur as to Part II.

McDONALD, J., dissents as to Part II.

McDONALD, J., concurs in part and dissents in part with an opinion.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

McDONALD, Justice, concurring in part, dissenting in part.

I would approve the trial judge's order denying relief in full. I have never felt that the alleged claim of a conflict of interest by the assistant public defender, simply because he

was an honorary deputy sheriff in an adjoining county, had adequate merit to require an evidentiary hearing on this issue.

BARKETT, Justice, concurring in part, dissenting in part.

I agree that Herring is entitled to a hearing on the conflict-of-interest question. However, I would also require, at the very least, a new sentencing hearing. I am dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law. As the majority notes, Herring was nineteen years old at the time of the crime; he had a low IQ; a learning disability; and an abused childhood. These were all deemed to be mitigating circumstances. On the other hand, we have found that the weightiest aggravating circumstance, that of cold, calculated, and premeditated murder, is no longer valid in this case. With the remaining aggravating circumstances weighed against the significant mitigating factors and the fact that this robbery/murder differs little from many others wherein the death penalty was deemed inappropriate, I would remand for a new sentencing hearing.

KOGAN, J., concurs.

TED HERRING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 89937.

Supreme Court of Florida.

Sept. 24, 1998.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., of armed robbery and first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 446 So.2d 1049, affirmed. Defendant sought postconviction relief. The Circuit Court, denied motion. Defendant appealed. The Supreme Court, 676 So.2d 369, remanded. On remand, the Circuit Court, William C. Johnson, J., denied motion. Defendant appealed. The Supreme Court held that public defender's status as a special deputy sheriff created no actual conflict of interest and did not result in ineffective assistance.

Affirmed.

Leon H. Handley of Gurney & Handley, P.A., Orlando, Florida, Jon M. Wilson and John R. Hamilton of Foley & Lardner, Orlando, Florida, and Jeremy G. Epstein, Alan S. Goudiss, James R. Warnot, Jr., Kathryn Tabner, Daniel Schimmel, and Steven M. Davidoff of Shearman & Sterling, New York, New York, for Appellant.

Robert A. Butterworth, Attorney General, and Kenneth S. Nunnelley, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Ted Herring, a prisoner under sentence of death, appeals the trial court's denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The issue in this appeal is whether Herring's public defender had an actual conflict of interest that adversely affected his performance. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed, we affirm the ruling of the trial court.

On May 29, 1981, a convenience store in Daytona Beach was robbed and the store clerk was found dead from two gunshot wounds. A hold-up note with a fingerprint on it was recovered from the store, and the fingerprint was subsequently determined to be that of Ted Herring. Herring was arrested and interrogated regarding the crimes. Herring waived his *Miranda* rights and made statements to police officers William Anderson, Dozell Varner, and Martin White. In his first statement to the officers, which was taped, Herring said that he went to the store with the intent to commit a robbery, but that prior to committing the crime a second man robbed the store and killed the clerk. In a second unrecorded statement made privately to Officer Varner, Herring confessed that he shot the clerk in the head and then, while the clerk was lying on the ground, shot the clerk a second time to eliminate him as a possible witness. In a final taped statement to the officers, Herring claimed that he robbed the store but accidentally shot the clerk twice after the clerk tried to grab his gun.

In February 1982, Herring was tried in Volusia County for armed robbery and first-degree murder. Herring was represented at the trial by two public defenders, Howard Pearl and Peyton Quarles. Pearl conducted the guilt phase of the trial and Quarles handled the penalty phase. Officer Varner testified at the trial regarding Harrison's unrecorded statement. At the time of his testimony, Officer Varner had received twenty-two oral reprimands for minor misconduct, one written reprimand for tardiness, and a one-day

suspension for an accident involving a city vehicle. Officer Varner had also received eight commendations for his police work, including a commendation for the arrest of Ted Herring. Following the direct examination of Officer Varner, Pearl's cross- examination focused only on whether Herring received food and water during his interrogation. Pearl's cross-examinations of officers Anderson and White were also limited to the topics of food and rest.

Herring testified at trial that his first statement to the officers was accurate—that the robbery and murder were committed by a second gunman. Herring denied having a private conversation with Officer Varner and claimed that the second taped confession was coerced. In closing arguments, Pearl, consistent with Herring's testimony, told the jury that a second gunman robbed the store and killed the clerk. Pearl asked the jury to question the testimony of the interrogating officers. Pearl also informed the jury that "[policemen] do a very difficult and dangerous job of community service, and the policemen that you saw, Mr. Varner and Mr. Anderson, Mr. White, are all good policemen, good detectives."

Herring was convicted of first-degree murder and sentenced to death. In aggravation, the trial judge found that Herring (1) was previously convicted of an unrelated armed robbery; (2) committed the murder in the course of a robbery; (3) committed the murder for the purpose of avoiding arrest; and (4) committed the murder in a cold, calculated and premeditated manner (CCP). The judge's sentencing order reflects that the "avoiding arrest" aggravator was based on Officer Varner's testimony. In mitigation, the judge found that Herring was nineteen years of age at the time of the crime and that he had a difficult childhood and learning disabilities. This Court affirmed Herring's convictions and death sentence in *Herring v. State*, 446 So.2d 1049 (Fla.1984), but subsequently struck down the application of the CCP aggravator. *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987). We rejected a motion to vacate Herring's death sentence that was predicated on our decision to recede from

the application of the CCP aggravator. *Herring v. State*, 580 So.2d 135 (Fla.1991).

In his first rule 3.850 motion, Herring raised an ineffective-assistance- of-counsel claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The trial judge denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla.1986).[1] Herring filed a second rule 3.850 motion and claimed, among other things, that he received ineffective assistance of counsel due to a conflict of interest between Pearl's status as a special deputy sheriff and Pearl's responsibilities owed to Herring.[2] The trial judge denied the motion, but this Court remanded the ineffectiveness issue for an evidentiary hearing. *Herring v. State*, 580 So.2d 135 (Fla.1991). Herring's hearing was consolidated with the hearings of eight other defendants who had raised similar "Howard Pearl claims."[3] The judge held that none of the defendants were adversely affected by Pearl's special deputy status. However, in *Teffeteller v. Dugger* (*Herring v. State*), 676 So.2d 369 (Fla.1996), this Court remanded four of the cases, including Herring's case, for individual evidentiary hearings solely on Pearl's status as a special deputy sheriff. As directed by this Court, a second evidentiary hearing was held, and Herring's motion was again denied. Herring now appeals the trial judge's ruling and raises the following

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[1] Of the denial of Herring's first rule 3.850 motion, we wrote, "The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla.1981). We fully agree with the trial judge's findings and commend him for his detailed explanation." *Herring*, 501 So.2d at 1280.

[2] In a separate case we held that Pearl's special deputy sheriff status was not a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla.1990).

[3] The other defendants were Robert Teffeteller, Kenneth Quince, Robert Henderson, Gerald Stano, Joel Wright, Johnny Robinson, Felix Castro, and Richard Randolph.

issues: (1) whether the trial judge erred in finding that Pearl was not encumbered by an actual conflict of interest; (2) whether Pearl's failure to testify regarding a strategic rationale for his trial actions or omissions preludes the State from showing that his performance was not adversely affected by his conflict; and (3) whether the trial judge's findings of fact regarding Dr. Spitz's testimony are clearly erroneous.

In his first claim, Herring challenges the trial judge's denial of his ineffective-assistance-of-counsel claim. Herring argues that Pearl's personal interest in maintaining his special deputy sheriff status required him to remain in the good graces of law enforcement personnel. Herring asserts that Pearl's need to ingratiate himself to law enforcement officials was an actual conflict of interest with his obligations to Herring. Herring claims that Pearl's conflict of interest adversely affected his representation in the following ways: (1) adopting the incredible second gunman defense to the exclusion of the more plausible accidental shooting defense; (2) failing to aggressively cross-examine law enforcement witnesses, including failing to question Officer Varner regarding his disciplinary record; (3) bolstering the credibility of law enforcement witnesses; and (4) abandoning Herring during the penalty phase of the trial.

It must be understood at the outset that Herring cannot raise in this appeal an ineffectiveness claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That claim has already been presented to and rejected by this Court, and Herring is procedurally barred from raising the claim in this appeal. We note that, had Pearl brought out Officer Varner's minor reprimands as Herring claims he should have, the door would have opened for the State to introduce Varner's commendations. In addition, Pearl's practice of not challenging the conduct of police officers in Volusia County absent hard evidence of misconduct was not unreasonable at the time Herring's case was tried in 1982. The alleged deficiency of Howard Pearl's performance is not

the issue in this appeal. The only issue properly before this Court is whether Pearl had an actual conflict of interest that caused him to render ineffective assistance.

To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Buenoano v. Dugger*, 559 So.2d 1116, 1120 (Fla.1990). Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. *See Buenoano v. Singletary*, 74 F.3d 1078, 1086 n. 6 (11th Cir.1996); *Porter v. Singletary*, 14 F.3d 554, 560 (11th Cir.1994); *Oliver v. Wainwright*, 782 F.2d 1521, 1524- 25 (11th Cir.1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is "insufficient to impugn a criminal conviction."

The trial judge made the following findings in his order denying Herring's ineffectiveness claim:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family."* The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr.

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* At the time Mr. Pearl sought to carry a concealed firearm there were no provisions for the sanctioning of private individuals to carry concealed weapons throughout the State of Florida.

Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm. . . . Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.

Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff. . . .

Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and [was] never given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy

sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm. . . . Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

. . . .

Defense counsel interpreted Mr. Pearl's alleged ineffective cross- examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting

> interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

As noted in the order, the trial judge found that Herring failed to establish the first prong of *Cuyler*—that Pearl labored under an actual conflict of interest. We agree. The record reveals no evidence suggesting that Herring's interests were impaired or compromised as a result of Pearl's special deputy status.

Herring argues that the trial judge erred as a matter of law in failing to recognize that a significant "adverse effect" is sufficient alone to demonstrate an "actual conflict of interest." For this proposition, Herring cites *Freund v. Butterworth*, 117 F.3d 1543 (11th Cir.1997), vacated, *Freund v. Butterworth*, 135 F.3d 1419 (11th Cir.1998). Although the cited *Freund* decision is a legal nullity, we note that Herring mischaracterizes the holding of the decision and we would not grant him relief even if the decision were law. *Freund* does state that "inquiries into 'actual conflict' and 'adverse effect' necessarily interrelate," 117 F.3d at 1571 (emphasis added), but does not state that ineffectiveness can be proven by evidence of adverse effect alone. In fact, in *Freund*, the Eleventh Circuit identified at least three separate sources of actual conflict. Although a court's inquiry into "actual conflict" and "adverse effect" may overlap, the *Cuyler* decision is clear on its face that the defendant must satisfy both prongs of the claim to prove ineffective assistance of counsel. Therefore, because Herring failed to demonstrate that an actual conflict of interest existed, we do not reach the issue of whether the conflict adversely affected Pearl's representation. *See Porter v. Singletary*, 14 F.3d 554, 560-61 (11th Cir.1994)(declining to address question of adverse effect on representation without proof of actual conflict).

We reject Herring's second and third claims because they pertain solely to the issue of "adverse effect" under *Cuyler*. Accordingly, we affirm the trial judge's denial of Herring's second rule 3.850 motion.

It is so ordered.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS, ANSTEAD and PARIENTE, JJ., concur.

MEMORANDUM

January 21, 1983

TO: C. W. Willits, Jr., Chief of Police

FROM: Lt. T.C. Galloway, Internal Affairs

SUBJECT: Officer Dozell Varner

The following information listed in reference to Officer Dozell Varner is on file in the Internal Affairs Office.

03/18/79 - Hired as Police Officer.
12/24/80 - Resigned & then rescinded his resignation.
04/05/81 - Transferred to CID.
12/13/81 - Transferred to Narcotics.
05/16/82 - Transferred to Patrol.

DISCIPLINARY ACTION TAKEN:

08/25/79 - Failed to turn in report (Sgt. Klem), Verbal reprimand.

09/29/79 - Poor judgment (Sgt. Connally), Verbal reprimand.

10/08/79 - Failed to make supplement (Sgt. Shumaker), Verbal reprimand.

10/10/79 - Poor judgment (Sgt. Ericksen), Verbal reprimand.

10/25/79 - Gas pump incident (Officer Ward), Verbal reprimand.

10/27/79 - Improper radio procedures (Sgt. Ericksen), Verbal reprimand.

11/26/79 - One hour late (Sgt. Champion), Verbal reprimand.

12/05/79 - Half hour late (Sgt. Ericksen), Written reprimand.

01/22/80 - Poor judgment (Sgt. Kincaid), Verbal reprimand.

02/11/80 - Failed to follow directions (Sgt. Kincaid), Verbal reprimand.

02/28/80 - Accumulation of minor rule violations (Sgt. Champion), Verbal reprimand.

03/16/80 - Late for work (Sgt. Klem), Verbal reprimand.

03/18/80 - Attachment "A" part of performance evaluation, Some repetition.

04/08/80 - Poor performance (Sgt. Ericksen), Verbal reprimand.

05/22/80 - Accumulation of minor rule violations (Sgt. Klem), Verbal reprimand.

07/21/80 - Failed to honor subpoena (Sgt. Ericksen), Verbal reprimand.

08/03/80 - Late for work/refusal to sign (Sgt. Ericksen), Verbal reprimand.

09/09/80 - Standard of conduct, re: sick leave (Sgt. Kincaid), Verbal reprimand.

09/25/80 - One hour late/no phone (Sgt. Kincaid), Verbal reprimand.

01/11/81 - Improper radio procedure (Sgt. Kincaid), Verbal reprimand.

03/02/81 - Accident City vehicle (Sgt. Ericksen), 1 day suspension.

06/16/81 - CID failure to assist Patrol (Sgt. Crow), Verbal reprimand.

09/29/81 - Failed to report for outside detail (Sgt. Umberger), Verbal reprimand.

10/07/81 - CID poor follow-up investigation (Capt. Powers), Verbal reprimand.

10/08/81 - CID poor administrative procedures (Sgt. Crow), Verbal reprimand.

07/16/82 - Late for work (Sgt. Pecry), Verbal reprimand.

08/09/82 - Late for outside detail (Sgt. Sloan), Verbal reprimand.

08/17/82 - Accumulation of minor rule violations (Sgt. Shumaker), Verbal reprimand.

09/08/82 - Late for work (Sgt. Connally), Written reprimand.

10/15/82 - Broken gas nozzle (Sgt. Shumaker), Verbal reprimand.

- Poor performance (Sgt. Shumaker), Verbal reprimand.

09/25/82 - Poor performance (Sgt. Kincaid), Verbal reprimand.

12/18/82 - Poor performance (Sgt. Kincaid), Pending.

12/29/82 - Untruthfulness (Sgt. Evans), Pending.

COMMENDATIONS:

07/07/79 - Group commended for handling a potential riot situation.

12/02/79 - Varner and Anderson for job interest.

12/28/79 - Group commended for handling a potential riot situation.

01/09/80 - Group commended for robbery/homicide 7-11 Store.

06/15/81 - Citizen's letter for a good job, re: B&E

06/19/81 - Varner & Lewis for "Old South Antique Shop" Investigation.

06/24/81 - Group commendation for Ted Herring arrest.

02/03/82 - Group commendation for Lt. Wyatt, re: drug case.

03/17/82 - Preserving drugs during search warrant.

07/07/82 - Letter from Ray Stark, re: Rosa & Diguilio case.

Respectfully submitted,

Lt. T.C. Galloway
Internal Affairs

TCG/el

STATE OF FLORIDA, *v.* TED HERRING, Defendant.	**IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA** CASE NO.: 81-1957-CFA

ORDER DENYING DEFENDANT'S "HOWARD PEARL" CONFLICT CLAIM IN DEFENDANT'S AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT CONVICTION AND SENTENCE PURSUANT TO RULE 3.850

THIS MATTER came before the Court on the mandate issued by the Florida Supreme Court on August 9, 1996 directing this Court to conduct an evidentiary hearing on whether the Defendant's trial counsel, Howard Pearl, had a conflict of interest with the Defendant or provided ineffective assistance to the Defendant as a result of his status as a special deputy sheriff, and the Court, having reviewed the Defendant's claim raising this issue, having received evidence, heard argument from counsel, and reviewed the court file, and being otherwise fully advised in the premises, hereby finds as follows:

PROCEDURAL HISTORY

A jury found this Defendant guilty of first degree murder and robbery with a firearm on February 25, 1982. The jury recommended death for the first degree murder conviction by a vote of eight to four on February 26, 1982. The trial court followed the recommendation of the jury and imposed a death sentence on the Defendant on March 1, 1982. The Defendant also received a consecutive term of ninety-nine (99) years imprisonment for the noncapital robbery offense. Defense counsel filed a motion for new trial and new penalty phase on March 5, 1982. The trial court denied that motion on March 11, 1982.

Direct Appeal

On February 2, 1984, the Florida Supreme Court affirmed these convictions and the sentence of death. *See generally Herring v. State*, 446 So. 2d 1049 (Fla. 1984). Rehearing was denied by that Court on April 11, 1984. *See id.* The United States Supreme Court denied certiorari review on November 5, 1994. *See generally Herring v. Florida*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

State Postconviction Proceedings (First)

The Defendant subsequently filed his first motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850, on April 4, 1985. The trial court summarily denied all relief requested in that motion on July 24, 1985. The Defendant appealed.

The Florida Supreme Court affirmed the trial court's order denying the Defendant's motion for postconviction relief on December 30, 1986. *See generally Herring v. State*, 501 So. 2d 1279 (Fla. 1986). Rehearing was denied by that Court on March 2, 1987. *See id.* The mandate issued on April 8, 1987.

State Habeas Corpus Proceedings

The Defendant then sought habeas corpus relief from the Florida Supreme Court on grounds that appellate counsel had rendered ineffective assistance during the Defendant's direct appeal. The petition was filed with that Court on March 9, 1987; it was denied on June 23, 1988. *See generally Herring v. Dugger*, 528, So. 2d 1176 (Fla. 1988). Rehearing was denied by that Court on August 25, 1988. *See id.*

Federal Habeas Corpus Proceedings

The Defendant then filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, in the United States District Court for the Middle District of Florida (Orlando Division) on September 9, 1988. On February 16, 1989, the federal district dismissed the Defendant's petition without prejudice on grounds that he had failed to exhaust all his claims in state court.

State Postconviction Proceedings (Second)

The Defendant then filed his second motion for postconviction relief, pursuant to Fla R. Crim. P. 3.850, on March 10, 1989 claiming that the cold, calculated and premeditated aggravating circumstance was erroneously found in his case given the decision in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 108 S.Ct. 733 (1988). After the State replied to this motion, the Defendant sought

leave to file an additional claim on May 15, 1989; the additional claim was the newly discovered "Howard Pearl" conflict claim. The trial court denied the Defendant's Rogers claim on May 25, 1989, but granted the Defendant thirty (30) days within which to file his newly discovered "Howard Pearl" conflict claim.

The Defendant subsequently filed an amended second motion for postconviction, pursuant to Fla. R. Crim. P. 3.850, on June 14, 1989, raising only the "Howard Pearl" conflict claim. The trial court thereafter adopted the findings it made on a similar issue raised in the *Harich* case[1] and summarily denied the Defendant's "Howard Pearl" conflict claim on November 5, 1989. The Defendant filed a motion for rehearing on November 20, 1989 that was denied on November 30, 1989. The Defendant appealed.

On May 2, 1991, the Florida Supreme Court affirmed the trial court's order summarily denying the Defendant's *Rogers* claims, but reversed the order denying the "Howard Pearl" conflict claim. *See generally Herring v. State*, 580 So. 2d 135 (Fla. 1991). The Court reasoned that the trial court's adoption of factual findings from another case was inappropriate and that an evidentiary hearing on the Defendant's "Howard Pearl" conflict claim was necessary. *See id.* at 139. The Court did, however, indicate that a consolidated evidentiary hearing would be proper to dispose of this single issue in all cases so affected. *See id.* The Defendant's case was then remanded for an evidentiary hearing on the "Howard Pearl" conflict claim. *See id.* The mandate issued on June 12, 1991.

Thereafter, the Honorable B.J. Driver was specially appointed to the Seventh Judicial Circuit by the Florida Supreme Court on April 8, 1992 "to hear State v. Herring, Case No. 81-1957C and State v. Wright, case No. 83-376-CFM, and all cases involving "Howard Pearl" issues." The consolidated evidentiary hearing on the "Howard Pearl"

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[1] *State v. Roy Allen Harich*, Case No. 81-1894-BB (7th Jud. Cir.).

conflict issue commenced on December 15, 1992 and concluded on December 18, 1992. Judge Driver issued his orders specifically denying Defendant TEFFETELLER's, QUINCE's, and HERRING's "Howard Pearl" conflict claims on April 2, 1993. Defendant Herring timely appealed Judge Driver's denial of his "Howard Pearl" conflict claim.

The Florida Supreme Court issued its opinion in the consolidated "Howard Pearl" cases on March 7, 1996. *See generally, Herring v. State*, 676 So. 2d 369 (Fla. 1996). In that opinion, the Court found that the consolidated evidentiary hearing held before Judge Driver violated the capital defendants' due process rights. *See id.* The Court, therefore, vacated the orders denying post conviction relief in the defendants' respective cases and remanded for individual hearing in each case before the judges who would normally be assigned to hear the defendants' 3.850 claims. *See id.* In its opinion, the Court directed the trial court judges "to conclude these matters in six months." *See id.* The Court denied rehearing on July 10, 1996. The mandate issued on August 9, 1996.

An evidentiary hearing pursuant to the Florida Supreme Court's mandate was held by this Court on November 25, 1996. The Court heard argument from counsel on this issue on November 27, 1996.

FINDINGS OF FACT

The evidence and testimony from witnesses presented at the evidentiary hearing held on November 25, 1996 pertained to whether Howard Pearl's status as a special deputy sheriff at the time he represented the Defendant made him a law enforcement officer with interests and duties adverse to the Defendant, thereby, establishing ineffective assistance of counsel.

Howard Pearl's Status as a Marion County Special Deputy Sheriff

Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family."[2] The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm. Mr. Pearl's status of special deputy sheriff continued under the administration of Sheriff Willis' predecessor, Sheriff Don Moreland. Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.

Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriffs' Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff. Unlike certified law enforcement officers of the Marion County Sheriff Department, Mr. Pearl paid his own annual premium to maintain his insurance. Sheriff Moreland testified that the insurance was required because the Marion County Sheriff's Department's concern was that it might be liable for any improper actions by Mr. Pearl with his concealed firearm. It is evident to this Court that the insurance was not required because Mr. Pearl was an employee of the Marion County Sheriff's Department, but rather, it was required to adequately cover the Marion County Sheriff's Department from liability resulting from its authorizing Mr. Pearl to carry a concealed firearm.

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[2] At the time Mr. Pearl sought to carry a concealed firearm there were no provisions for the sanctioning of private individuals to carry concealed weapons throughout the State of Florida.

Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and never given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purpose of Mr. Pearl being able to carry a concealed firearm.

In addition, James B. Gibson, the Public Defender for the Seventh Judicial Circuit at present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as special deputy sheriff and that status was honorary and only for the purpose of carrying a firearm. Mr. Gibson also testified that there was no connection between Mr. Pearl's status and Mr. Pearl's representation in capital cases. Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

CONCLUSIONS OF LAW

This Court will separately address whether Mr. Pearl has a per se conflict of interest with the Defendant by virtue of his special deputy sheriff status with the Marion County Sheriff's Department and whether any actual conflict existed from Mr. Pearl's status.

Per Se Conflict of Interest

The defense expert, Professor Stephen Gillers, testified that, by the simultaneous existence of Mr. Pearl's special deputy status and his status as a public defender, there was a per se violation of the Florida Disciplinary Rule 5-101 which covers conflicts of interest. However, based on this Court's factual findings with respect to the actual scope of Mr. Pearl's duties as a special deputy sheriff with the Marion County Sheriff's Department, it finds that those duties were not in conflict with Mr. Pearl's duties as a public defender. Therefore, no per se conflict of interest existed between Mr. Pearl and the Defendant. *See Harich v. State*, 573 So. 2d 303, 305 (Fla. 1990) (finding no per se conflict of interest where defense counsel was a special deputy sheriff at the time of representation).

Actual Conflict of Interest

To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected his counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718, 1719 64 L.Ed.2d 333 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116, 1120 (Fla. 1990); *Burnside v. State*, 656 So. 2d 241, 244 (Fla. 5th DCA 1995).

Mr. Pearl testified that his special deputy status never interfered with his public defender duties and that the only purpose for this status was carrying a concealed firearm. In addition, Mr. Gibson, the Public Defender, testified that Mr. Pearl's status and his handling of capital cases had no connection and that Mr. Pearl's status never caused him to question Mr. Pearl's integrity or ability in representing clients. Further, Sheriff Moreland testified that the special deputy status issued to Mr. Pearl was never used to influence Mr. Pearl or the Public Defender's Office in any way.

Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.

The defense presented an expert in criminal defense, James M. Russ, Esquire, who testified that Mr. Pearl's cross examination of the law enforcement officers and his closing argument were ineffective under the *Cuyler* standard due to Mr. Pearl's special deputy status. However, Mr. Pearl testified that, even though he did not specifically remember this case, it was his practice to never outright attack and call

law enforcement officers liars, unless he had certain proof of the misrepresentations, due to the nature of juries' views on law enforcement officers in Volusia County at that time. Therefore, this Court finds that the Defendant has not proven that, because of Mr. Pearl's status, his representation was ineffective, due to the fact that Mr. Russ would have aggressively pursued other avenues if he defended this case, specifically in light of Mr. Russ' limited experience (one case) of trying capital cases in Volusia County at that time period. Further, when the State asked the question of Mr. Russ, "Would Howard Pearl in your opinion have a conflict of interest and be deficient in representation in every case he tried while he had this special deputy sheriff's card from Marion County because of the, quote, fundamental conflict you testified to as per his dual service status," Mr. Russ answered "Yes," in conflict with the Florida Supreme Court's finding in *Harich*. *See Harich v. State*, 573 So. 2d 303, 305 (Fla. 1990) (finding no per se conflict of interest where defense counsel was a special deputy sheriff at the time of representation).

The defense also presented an expert in forensic pathology, Dr. Werter Spitz, who testified that the second shot of the victim was consistent with a shot while the victim was falling down, not while the victim was lying on the ground, thereby, discounting the "witness elimination" factor. However, Dr. Spitz also conceded that the second shot was also consistent with the victim lying on the ground with a defensive move of his hand due to fear. In addition, the defense did not offer any testimony that this expert or any other expert was accessible or available to Mr. Pearl at the time of trial in this case. Also, both Mr. James Peyton Quarles, Esquire and Mr. Pearl's co-counsel, and the defense expert, Mr. Russ stated that using an accident theory of defense to explain the second deadly shot was not viable, especially in the light that the Defendant testified at trial that another person shot the victim. Thus, this Court finds that the Defendant has not proven Mr. Pearl was ineffective for not providing an expert who would testify to this theory of the

second shot and that this absence of testimony was actually due to Mr. Pearl's special deputy status.

Accordingly, it is

ORDERED AND ADJUDGED that (1) the Defendant's "Howard Pearl" Conflict Claim in the Defendant's Amended Motion to Vacate, Set Aside or Correct Sentence and Conviction, filed June 14, 1989, as well as any claim that the Defendant's trial counsel had a conflict of interest or rendered ineffective assistance by virtue of his special deputy sheriff's status with the Marion County Sheriff's Department is hereby **DENIED**; and (2) the Defendant is hereby advised that he has thirty (30) days from the date hereof in which to appeal this Order.

DONE AND ORDERED in Chambers, Daytona Beach, Volusia County, Florida, this 31st day of January, 1997.

/s/ William C. Johnson, Jr.

WILLIAM C. JOHNSON, JR.
Circuit Court Judge

cc: Jeremy G. Epstein, Esquire, Shearman & Sterling, for Defendant
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(2)

Supreme Court, U.S.
FILED
MAY 14 1999
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No. 98-1493

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

TED HERRING, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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458

QUESTIONS PRESENTED

Herring states the Questions Presented in the following way:

1. Whether the Florida Supreme Court -- in conflict with the United States Court of Appeals for the Second, Third, Fourth, and District of Columbia Circuits -- erred in excluding evidence of trial performance in determining whether a death penalty defendant's attorney "actively represented conflicting interests" within the meaning of this Court's decision in *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980).

2. Whether the Florida Supreme Court correctly held -- in direct conflict with this Court's decisions in *Clemons v. Mississippi,* 494 U.S. 738 (1990) and *Sochor v. Florida,* 504 U.S. 527 (1992) -- that it could vacate an aggravating circumstance and impose the death penalty without either reweighing or conducting a harmless error analysis.

Respondent restates the Questions Presented in the following way:

1. Whether this Court should exercise its certiorari jurisdiction to review the decision of the Florida Supreme Court when that decision does not conflict with the decision of any Federal court, when the issue was correctly decided by the State Court, and when the issue contained in the petition presents only factual questions which are inappropriate for certiorari review?

2. Whether this Court should exercise its certiorari jurisdiction to review an issue that has never been presented to the State Courts, that is untimely raised, and is not of sufficient importance to justify certiorari review?

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No. 98-1493

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

TED HERRING, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent State of Florida respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Supreme Court's May 2, 1991, and September 24, 1998 opinions denying Herring's various motions for post-conviction relief. Those opinions appear in Herring's *Appendix* at A-35 and A-24, respectively.

JURISDICTION

Herring asserts that jurisdiction exists pursuant to 28 U.S.C. § 1257, and states that he seeks certiorari "to review two decisions of the Florida Supreme Court pursuant to this Court's Rule 12.4." *Petition*, at 2. Those decisions were entered more than seven years apart, and the State of Florida does not concede that the petition is timely with respect to the May 2, 1991, judgment. Moreover, that judgment does not involve "identical or closely related questions" with respect to

the September 24, 1998, judgment as required by Supreme Court Rule 12.4 for the presentation of a single petition for writ of certiorari respecting multiple judgments.

The petition for certiorari with respect to the September 24, 1998, decision of the Florida Supreme Court appears to be timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Herring asserts that the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are involved in the issues contained in this petition.

STATEMENT OF THE CASE

The "Statement of the Case" set out at pages 2-10 of Herring's petition is argumentative, and, for that reason, is not accepted by the Respondent State of Florida. The State relies upon the following statement of the case, which is based upon the facts found by the Florida Supreme Court in connection with its disposition of the various matters Herring has brought before that Court.

The Direct Appeal Facts

On direct appeal to the Florida Supreme Court, that Court summarized the facts giving rise to Herring's conviction and death sentence in the following way:

> Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper

distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot [sic].

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department, where he was advised of his Miranda rights. Herring signed a written waiver of his Miranda rights and was interrogated by detectives. During the course of the interrogation, he was asked about several armed robberies, including the May 29 convenience store robbery-murder. A judgment of guilty in one of these other armed robberies

was entered against appellant on January 8, 1982. Appellant, in his first statement, which was taped, told the detectives that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over money or be shot. He claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, told the clerk to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk

once in the head and once again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was identified as the appellant's.

At the conclusion of the guilt phase of the trial, the jury found appellant guilty of armed robbery and first-degree murder.

In the penalty phase of the trial, the state put into evidence a certified copy of the judgment and sentence for the prior unrelated robbery with a firearm, which judgment was entered on January 8, 1982. The state also presented the testimony of a probation and parole officer who had spoken to Herring in June, 1981, concerning the murder. She testified that Herring denied committing the murder but that he also commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker."

Appellant's mother testified on his behalf and stated that she and the appellant's father were divorced when the appellant was four years of age; that the appellant was treated for psychological problems and was diagnosed as hyperactive with learning disabilities; and that the appellant, who dropped out of school after completing the fifth grade, has an IQ of eighty. The appellant also attempted to present the

testimony of three attorneys who had represented persons charged with first-degree murder who received life sentences after pleading guilty. This testimony was rejected by the trial court. The trial court also rejected the proffer of two poems authored by the appellant which were contained in a clinical report written about him. No testimony was proffered concerning the report, nor was the person who prepared the report called to testify.

By an eight-to-four vote the jury recommended the imposition of the death penalty. The trial judge imposed the death penalty, finding four aggravating and two mitigating circumstances. The aggravating circumstances found by the trial judge were: (1) that appellant had previously been convicted of a robbery with a firearm, a felony involving the use or threat of violence to a person; (2) that the murder was committed while appellant was engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial judge found (1) that the appellant had a difficult childhood and had learning disabilities, and (2) that he was nineteen years old at the time of the crime.

Pet. App., at 10-13. This Court denied certiorari on November 11, 1984. *Herring v. Florida,* 469 U.S. 989 (1984).

The Collateral Attack Proceedings

In its 1998 decision, the Florida Supreme Court summarized the collateral attack history of Herring's case as follows:

> This Court affirmed Herring's convictions and death sentence in *Herring v. State*, 446 So.2d 1049 (Fla. 1984), but subsequently struck down the application of the CCP aggravator. *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987). We rejected a motion to vacate Herring's death sentence that was predicated on our decision to recede from the application of the CCP aggravator. *Herring v. State,* 580 So.2d 135 (Fla. 1991).
>
> In his first rule 3.850 motion, Herring raised an ineffective-assistance-of-counsel claim based on deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The trial judge denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla. 1986). (FN1) Herring filed a second rule 3.850 motion and claimed, among other things, that he received ineffective assistance of counsel due to a conflict of interest between Pearl's status as a special deputy sheriff and Pearl's responsibilities owed to Herring. (FN2) The trial judge denied the motion, but this Court remanded the ineffectiveness issue for an evidentiary hearing. *Herring v. State*, 580 So.2d 135 (Fla. 1991). Herring's hearing was consolidated with the hearings of eight other defendants who had raised similar "Howard

Pearl claims." (FN3) The judge held that none of the defendants were adversely affected by Pearl's special deputy status. However, in *Teffeteller v. Dugger (Herring v. State)*, 676 So.2d 369 (Fla. 1996), this Court remanded four of the cases, including Herring's case, for individual evidentiary hearings solely on Pearl's status as a special deputy sheriff. As directed by this Court, a second evidentiary hearing was held, and Herring's motion was again denied.

> FN1. Of the denial of Herring's first rule 3.850 motion, we wrote, "The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla. 1981). We fully agree with the trial judge's findings and commend him for his detailed explanation." *Herring*, 501 So.2d at 1280.

> FN2. In a separate case we held that Pearl's special deputy sheriff status was not a per se conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla. 1990).

> FN3. The other defendants were Robert Teffeteller, Kenneth Quince, Robert Henderson, Gerald Stano, Joel Wright, Johnny Robinson, Felix Castro, and Richard Randolph.

Pet. App., at A-36-37.[1]

REASONS FOR DENYING THE WRIT

I. THE CONFLICT OF INTEREST ISSUE

The first question contained within the petition concerns Herring's claim that the decision of the Florida Supreme Court on the conflict of interest claim "directly conflicts with decisions of numerous other courts and demonstrates uncertainty in the lower courts in the application of *Cuyler v. Sullivan*". *Petition*, at 13. For the reasons set out below, the

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[1] Herring also filed a federal habeas corpus petition. The Florida Supreme Court described that litigation as follows:

> In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion under rule 3.850, asserting that our decision in *Rogers* was a change in the law.

Pet. App., at A-27.

opinion of the Florida Supreme Court is a correct application of this Court's *Cuyler* decision, does not conflict with any other decision, and does not present an appropriate case for the exercise of this Court's certioriari jurisdiction.

The State trial court conducted an evidentiary hearing on the conflict of interest issue, and made the following findings of fact:

> Howard Pearl applied to become a special deputy sheriff in Marion County in 1970. He sought to obtain this status in order to have the authority to carry a concealed firearm throughout the State of Florida "for protection of self and family." * The sheriff of Marion County in 1970, Doug Willis, apparently granted Mr. Pearl the status of special deputy sheriff for the purposes of carrying a concealed firearm.... Sheriff Moreland testified that he continued Mr. Pearl's status as a professional courtesy and that this was a common practice at that time to continue the status of prominent members of the community.
>
> Although Mr. Pearl was required to maintain liability insurance by the Marion County Sheriff's Department through the Florida Sheriff's Self-Insurance Fund, he had no criminal law enforcement authority or duties and was considered as an unpaid medium hazard special deputy sheriff....
>
> Despite the fact that Mr. Pearl's identification card issued by the Marion County Sheriff's Department stated that he was "a regularly

constituted deputy sheriff," this Court finds that the testimony of Mr. Pearl and Sheriff Moreland, at the evidentiary hearing, clearly shows that Mr. Pearl's status was an honorary appointment. Specifically, Mr. Pearl (1) was never certified as a law enforcement officer; (2) never received any compensation from or executed any employee tax forms from the Marion County Sheriff's Department; (3) received no law enforcement training from the Marion County Sheriff's Department; (4) was never issued a uniform, vehicle or any other equipment from the Marion County Sheriff's Department; (5) never made and [was] never given the authority to make any arrests, stops or any other duties as a deputy sheriff of the Marion County Sheriff's Department; (6) never reported to any roll calls at the Marion County Sheriff's Department; (7) was never on a duty roster for the Marion County Sheriff's Department; (8) was never copied on any internal memoranda from the Marion County Sheriff's Department, other than insurance renewal notices; (9) never was asked to act in any way for the Marion County Sheriff's Department; and (10) never held himself out as a regularly constituted deputy sheriff of the Marion County Sheriff's Department. In fact, Sheriff Moreland testified that Mr. Pearl's status was "honorary" in nature and was solely for the purposes of Mr. Pearl being able to carry a concealed firearm.

In addition, James P. Gibson, the Public Defender for the Seventh Judicial Circuit at

present and at the time of Mr. Pearl's representation of the Defendant, testified that he knew of Mr. Pearl's status as a special deputy sheriff and that status was honorary and only for the purpose of carrying a concealed firearm.... Further, Mr. Gibson testified that Mr. Pearl never failed to act responsibly to his clients due to this status and that he never questioned Mr. Pearl's integrity or ability in representing clients because of this special deputy status.

Accordingly, this Court finds as a matter of fact that Mr. Pearl never was and never has been a law enforcement officer of the Marion County Sheriff's Department. Essentially, Mr. Pearl was granted a concealed firearms permit by the Marion County Sheriff's Department in the same manner that many other individuals received during that time period. Contrary to defense counsels' assertions, this Court determines that Mr. Pearl had no actual or apparent authority to act as "a regularly constituted deputy sheriff" for the Marion County Sheriff's Department because at no time did he indicate to anyone that he possessed anything other than a "gun toter's permit" as a result of his special deputy status.

....

Defense counsel interpreted Mr. Pearl's alleged ineffective cross-examinations and alleged bolstering of law enforcement officers as the adverse effect of his conflict of interest. However, defense counsel presented no

> evidence or testimony that demonstrated that Mr. Pearl was actively representing conflicting interests. Therefore, this Court finds that the Defendant and his counsel failed to demonstrate that any actual conflict of interest existed between Mr. Pearl and the Defendant resulting from Mr. Pearl's special deputy status.
>
> > *At the time Mr. Pearl sought to carry a concealed firearm there were no provisions for the sanctioning of private individuals to carry concealed weapons throughout the State of Florida.

Pet. App. A-39-42. The Florida Supreme Court quoted those facts in its opinion, and affirmed the denial of relief. *Pet. App.* A-42-43. That detailed discussion of the facts and the applicable law clearly demonstrates that the Florida Supreme Court decided this issue in accord with *Cuyler v. Sullivan.* Because the issue was correctly decided by the State Court, there is no basis for certiorari review.

Herring's Petition implies that the Florida Supreme Court did not consider the "performance" of his trial attorney in decided the conflict issue, and tacitly suggests that such performance has never been considered by any state court. The true facts are that Herring has already lost on his claims of ineffective assistance of counsel, and received the proceeding under review herein only because of the peculiar circumstances of his conflict of interest claim. *App.* at A-17-20.

Herring identifies four cases which, according to him, conflict with the decision of the Florida Supreme Court. When those decisions are considered in their entirety, instead of being

read out-of-context, they stand for the wholly unremarkable proposition that *Cuyler v. Sullivan* requires a defendant seeking relief based upon an alleged conflict of interest to "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). That is a two-part standard, and none of the "conflicting" cases relied upon by Herring allow the defendant to escape the burden of proving not only an actual conflict, but also an "adverse effect" as a result thereof. For example, *United States ex rel. Duncan v. O'Leary*, 806 F.2d 1307, 1315 (7th Cir. 1986), decided the actual conflict component first, and then decided the "adverse effect" issue. That disposition is in accord with the Florida Supreme Court's decision in this case -- that Court found that there was no actual conflict and that there was therefore no need to address the adverse effect component of *Cuyler*. Likewise, *United States v. Tatum*[2], *United States v. Taylor*[3], *Strouse v. Leonardo*[4], and *Government of Virgin Islands v. Zepp*[5] do not stand for the proposition advanced by Herring. Those cases recognize that *Cuyler* established a two-part test, and that the defendant must meet both components before he is entitled to relief. None of the cases relied upon by Herring to establish a conflict of decisions compels a result other than the one reached by the Florida Supreme Court. There is no conflict between the Florida Supreme Court and any of the Federal Appeals Courts, and there is no basis for the exercise of this Court's certiorari jurisdiction. Herring's petition should be denied.

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[2] 943 F.2d 370 (4th Cir. 1991).

[3] 139 F.3d 924 (D.C. Cir. 1998).

[4] 928 F.2d 548 (2d Cir. 1991).

[5] 748 F.2d 125 (3d Cir. 1984).

This Court should also decline to exercise its certiorari jurisdiction in this case because the only issue presented is a question of fact which is inappropriate for certiorari review. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955); *Grayson v. Harris,* 267 U.S. 352, 358 (1925). In order to decide this case, this Court would be compelled to review the evidence and discuss specific facts. Under long-standing law, that is not the function of certiorari review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). This Court should not exercise its certiorari jurisdiction in this case.

II. THE AGGRAVATING CIRCUMSTANCE ISSUE

The second question presented in the petition concerns the Florida Supreme Court's 1991 decision in Herring's case with respect to the cold, calculated, and premeditated aggravating circumstance. In pertinent part, the Florida Supreme Court's opinion reads as follows:

> With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and

premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find

> that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

Pet. App., at A-30-31. This Court should decline to exercise its certiorari jurisdiction over this claim for the following reasons.

The claim contained in Herring's petition is predicated on *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Sochor v. Florida*, 504 U.S. 527 (1992). However, that claim was never raised before the State Courts, and, in fact, Herring argued on appeal to the Florida Supreme Court in 1990 that he was entitled to relief on **State law grounds.**[6] The federal question contained in the petition was not decided by the Florida Supreme Court, which decided the state law claim on state law grounds. *Herring, supra.* Herring made no effort to raise the federal claim contained in the petition before any Florida court, and, for that reason, certiorari review is inappropriate. *Allen v. McCurry,* 449 U.S. 90, 105 (1980); *Beck v. Washington,* 369 U.S. 541 (1962); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).[7]

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[6] The pertinent portions of Herring's brief to the Florida Supreme Court appear at *Apppendix* A-1-16.

[7] A *Clemons*-based claim was arguably contained in Herring's motion for rehearing before the Florida Supreme Court. However, a motion for rehearing is insufficient to present a federal question to the state courts. *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

This Court should also decline to exercise its certiorari jurisdiction in this case because, assuming *arguendo* that there is federal question presented, the petition is untimely. The judgment of the Florida Supreme Court at issue in the second part of the petition was rendered on May 2, 1991, and rehearing was denied by that Court on June 12, 1991. *Herring v. State,* 580 So.2d 135 (Fla. 1991). The State Court judgment was final at that time for all purposes, including seeking review before this Court. Under any interpretation of this Court's rules, the time for filing a petition for writ of certiorari respecting that decision expired eight years ago. *See, e.g., Cox Broadcasting Corp. v. Cox,* 420 U.S. 469, 482-83 (1975). The present petition is untimely and should be denied. To the extent that Herring relies on *Reece v. Georgia,* 350 U.S. 85, 86-87 (1955), for the proposition that his petition for certiorari review is timely, *Reece* is inapposite to the situation present in this case. *Reece* presented a bizarre factual situation that is not present in this case, and does not establish that Herring's petition is timely.

Moreover, the Florida Supreme Court made an express and detailed finding of harmless error that comports with this Court's *Sochor v. Florida* decision. That disposition is correct, and there is nothing more that the State Courts can or should do.

Finally, the petition should be denied because the question presented therein is not of sufficient importance to justify the exercise of this Court's certiorari jurisdiction. The true facts are that the issue is of no interest to anyone other than the parties to this litigation. The narrow issue contained in the petition has no significance outside of this case, and this Court

should decline to exercise its certiorari jurisdiction. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

CONCLUSION

For the reasons set out above, Respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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ARGUMENT

I.

THE ERRONEOUS APPLICATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE REQUIRES VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation of The Eighth And Fourteenth Amendments

Herring I has now been explicitly overruled by *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L.Ed.2d 681, 108 S.Ct. 733 (1988) ("Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question."); *see Herring III*, 528 So.2d at 1178 ("Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*.") (citations omitted). *Rogers* and *Herring III* confirm that Herring is now entitled to relief on the merits of this claim.

1. The Application Of The Heightened Premeditation Aggravating Circumstance To The Facts Of This Case Was An Aberration in Florida Capital Jurisprudence.

The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> [t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla.Stat.Ann. §921.141(5)(I) (West Supp. 1984) (the "heightened premeditation aggravating circumstance").

At the time Herring was sentenced to death, Florida case law clearly defined the scope of this aggravating circumstance. It was restricted to circumstances in which the degree of premeditation is shown to be greater than that necessary to establish premeditation for conviction in the guilt/innocence phase of a capital felony trial. *See Preston v. State*, 444 So.2d 939 (Fla. 1984) (citing cases). It applies only to cases in which "the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and though by the perpetrator." *Id.* At 946. Consequently, "[p]roof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction." *Maxwell v. State*, 432 So.2d 967, 971 (Fla. 1983); *accord Washington v. State*, 432 So.2d 44, 48 (Fla. 1983) ("[t]his aggravating circumstance inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation"); *Combs v. State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 72 L.Ed.2d 862, 102 S.Ct. 2258 (1982).

In this case, there was no evidence of a preconceived plan to commit a murder. Nor does the record contain any evidence of "a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." *Preston*, 444 So.2d at 946. On the contrary, the homicide here was a spontaneous event

which occurred quickly and thoughtlessly. Nothing in this case suggests premeditation, heightened or otherwise. Herring undertook to rob a convenience store, as he had done on prior occasions. In his confession, the product of eight hours of interrogation by the police, he stated that the clerk's sudden movement caused him to panic and fire his gun. He stated that he shot the clerk "by mistake," "out of fear," and in response to what he perceived to be a threatening movement by the clerk. R.O.A. at 10-11; *cf. Cannady v. State*, 427 So.2d 723, 730 (Fla. 1983) ("[t]hese statements establish that [the defendant] had at least a pretense of a moral or legal justification, protecting his own life"). The State offered no evidence that contradicted Herring's version of the shooting. There is thus no evidence of reflection. The evidence demonstrates that the gun was fired reflexively, as a spontaneous reaction rather than a planned act.

Moreover, there was no evidence that the homicide was preconceived. In fact, the record shows that the contrary was the case. In confessing to the crime for which he was sentenced to death, Herring also confessed to four other armed robberies in which no one was hurt and his gun was never fired. This refusal to use his gun in these other cases demonstrates forcefully that he had no intention of using it in the present case, and that he did so only as a responsive act.

The heightened premeditation aggravating circumstance has been held inapplicable to cases in which the evidence established that the victim was killed "intentionally and deliberately," but nothing more. *Maxwell*, 443 So.2d at 971. Rather, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders." *McCray v. State*, 416 So.2d 804, 807 (Fla. 1982). Although this Court in *McCray* also observed that "that description is not intended to be all-inclusive," *Id.*, nothing in

any case construing Section 921.141(5)(I) -- save one, *Herring I* -- suggests that this aggravating circumstance is applicable to any capital felony case unless there is substantial evidence that the killer first devised a plan to commit the murder and thereafter put that plan into effect.

Numerous cases construing Section 921.141(5)(I) prior and subsequent to Herring's direct appeal have rejected the applicability of this aggravating circumstance to facts which show far more "lengthy, methodic or involved . . . atrocious events" and in which thee was a far more "substantial period of reflection and thought by the perpetrator" than was established here. *See, e.g., Preston*, 444 So.2d at 945 (heightened premeditation aggravating circumstance held inapplicable where, after robbing a convenience store, the murderer kidnapped the store clerk, forced her to walk a mile and a half at knifepoint, after which the murderer cut the clerk's throat "by severing the jugular veins, trachea and main arteries of the neck," stabbed the victim numerous times about her body, and cut a cross mark into her forehead); *White v. State*, 446 So.2d 1031 (Fla. 1984) (heightened premeditation aggravating circumstance held inapplicable where the evidence established that defendant had robbed a convenience store, in the course of which he shot and killed a customer; shot the store clerk twice, paralyzing him permanently from the neck down; and attempted to shoot two other persons who came into the store); *Blanco v. State*, 452 So.2d 520, 526 (Fla. 1984), *cert. denied*, 469 U.S. 1181, 83 L.Ed.2d 953, 105 S.Ct. 940 (1985) (although defendant, while committing a burglary, shot the victim six times after the victim had fallen from his first shot, Florida Supreme Court concluded "there was no showing of heightened premeditation beyond a reasonable doubt necessary to the proper application of this factor"); *Hamblen v. State*, 527 So.2d 800, 805 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where "the evidence [did] not

indicate that [the defendant] had a conscious intention of killing [the victim] when he decided" to commit the robbery); *Garron v. State*, 528 So.2d 353 (Fla. 1988) (heightened premeditation aggravating circumstance held inapplicable where killing of stepdaughter appeared to have been a "spontaneous reaction").[1] The decision reached in Herring's direct appeal was, and remains, a solitary aberration in the construction of the heightened premeditation aggravating circumstance.

A noteworthy example of how the Florida courts have, with the sole exception of *Herring I*, consistently applied the

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[1] *See also McCray*, 416 So.2d at 805 (heightened premeditation aggravating circumstance held inapplicable where themurderer first stole several boxes of rifles from the victim's van, and later, after taking them to the edge of a wooded area, returned to the victim's van where the killer yelled, "This is for you, you motherfucker," and shot the victim three times in the abdomen); *Cannady*, 427 So.2d at 730 (heightened premeditation aggravating circumstance held inapplicable where the killer first abducted a hotel employee and later shot victim five times, killing him); *King v. State*, 436 So.2d 50 (Fla. 1983), *cert. Denied,* 466 U.S. 909, 80 L.Ed.2d 163, 104 S.Ct. 1690 (1984) (heightened premeditation aggravating circumstance held inapplicable where the victim had first been struck on the head with a blunt instrument by her roommate, who thereafter shot her in the head); *Peavey v. State*, 442 So.2d 200 (Fla. 1983) (heightened premeditation aggravating circumstance held inapplicable where the elderly victim was stabbed several times and his apartment was ransacked by defendant, who sprayed shaving cream on the door lock to avoid detection and had, prior to the murder, accompanied the victim into his apartment by helping him with his groceries); *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 80 L.Ed.2d 563, 104 S.Ct. 2181 (1984) (heightened premeditation aggravating circumstance held inapplicable where evidence revealed that the victim, a 73-year-old woman, was killed after she fought long and hard for her life); *Drake v. State*, 441 So.2d 1079 (Fla. 1983), *cert. denied*, 466 U.S. 978, 80 L.Ed.2d 832, 104 S.Ct. 2361 (1984) (heightened premeditation aggravating circumstance held inapplicable in spite of evidence that the victim was first kidnapped; later raped, using her bra to tie her hands behind her back; and finally killed, being stabbed repeatedly in the lower chest and abdomen).

heightened premeditation aggravating circumstance can be found in *Caruthers v. State*, 465 So.2d 496 (Fla. 1985), a case decided one year after *Herring I*. In *Caruthers*, this Court reversed a death sentence and instructed the trial court to impose a life sentence on the basis of a factual record virtually identical to the record here. The material facts of *Caruthers* were that (1) a convenience store clerk, who had known the accused, was found dead behind the store counter, with the cash register open, and (2) after his arrest, the accused confessed to the robbery and homicide, claiming that he shot the clerk three times after the clerk made a sudden movement. 465 So.2d at 497-98. Finding that the operative facts failed to establish "a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder," this Court concluded that the imposition of the death penalty was disproportionate. *Id.* At 498-99.

This Court vacated Caruthers' death sentence based, in part, upon a finding that two aggravating circumstances were erroneously applied. Both of these same aggravating circumstances form the basis for Herring's sentence Yet, despite the startling similarities between *Caruthers* and *Herring*, this Court reached a totally inconsistent conclusion on direct appeal in Herring's case. The only meaningful differences between the present case and *Caruthers* weigh in Herring's favor: Herring had never met the store clerk before, unlike Caruthers, who was known to his victim; and the clerk was shot twice in *Herring*, three times in *Caruthers*. If the Florida death penalty statute can permit two diametrically opposite results to flow from the same set of facts, then that statute surely is being applied in an arbitrary and capricious fashion.

On direct appeal in this case, this Court affirmed the trial court's ruling as to the applicability of this aggravating

circumstance. *Herring I*, 446 So.2d at 1057. Justice Ehrlich dissented from this finding, stating:

> We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.145(I), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Id. At 1058 (Ehrlich, J., concurring in part, dissenting in part) (emphasis supplied).

Justice Ehrlich's analysis of the inapplicability of this aggravating circumstance to Herring's case was correct, as this Court acknowledged in *Rogers*:

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which bear the indicia of "calculation". Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in *Herring v. Stat*, 446 So.2d 1049, 1057 (Fla.), *cert. Denied*, 469 U.S. 989 (1984), to the extent it dealt with this question.

511 So.2d at 533 (emphasis supplied).

Herring's death sentence is unique under Florida's capital sentencing statute, and as a consequence, Herring is in a class of one on death row in Florida. In no case, either before Herring's or since, has this aggravating circumstance been applied under facts remotely resembling the facts of this case, and this Court has held it erroneous to do so.

2. The Application Of The Heightened Premeditation Aggravating Circumstance Is An Error Of Constitutional Dimension

While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982).

Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47, 96 S.Ct. At 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Maynard v. Cartwright*, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988) (citing *Godfrey*, 446 U.S. at 429, 100 S.Ct. At 1765).

In *Cartwright*, 486 U.S. at 356, t he Court unanimously affirmed the vacatur of a death sentence based on the erroneous application of a statutory aggravating circumstance. Relying on *Godfrey*, t he Court concluded that the Oklahoma Court of Criminal Appeals had "failed to apply its previously recognized limiting construction of the aggravating circumstance," and that, as a result, "there was 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Cartwright*, 486 U.S. at 363, 108 S.Ct. At 1859 (quoting *Godfrey*, 446 U.S. at 433, 100 S.Ct. At 1767). The Court concluded that the application of the aggravating circumstance to the facts of *Cartwright* "without some narrowing principle to apply to those facts" violated the Eighth Amendment. *Id.*

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. Denied*, 464 U.S. 1002, 78 L.Ed.2d 697, 104 S.Ct. 508 (1983), the Eleventh Circuit vacated a death sentence on the basis of, among to her things, the erroneous application of Florida's "heinous, atrocious, and cruel" aggravating circumstance, as well as the state's "risk of death to many persons" aggravating factor. Relying on *Godfrey*, the court held that "[a]pplication of [these] aggravating factor[s] to the facts of this case is not only inconsistent with the Florida Supreme Court's construction of the provision[s]; it also reflects an absence of control or guidance of the sentencing judge's discretion." 685 F.2d at 1265-66. The court concluded that the erroneous application of the statutory aggravating circumstances "suggests no 'inherent restraint on the arbitrary and capricious infliction of the death sentence,'" and therefore violated the Eighth Amendment. *Id.* at 1264-65 (quoting *Godfrey*, 446 U.S. at 428, 100 S.Ct. At 1764).

As the Eleventh Circuit later explained in *Hargrave v. Wainwright*, 804 F.2d 1182, 1194 (11th Cir.), *rehearing en banc granted and vacated on other grounds*, 809 F.2d 1486 (11th Cir. 1986):

> In sum, the state reviewing courts in both *Proffitt* and *Godfrey* failed to give any explanation or set forth any facts upon which the courts justified their findings of the particular aggravating circumstance under review. Moreover, upon an independent examination of the record, neither this circuit in *Proffitt* nor the Supreme Court in *Godfrey* could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstance to apply.

Id. (Emphasis supplied). This rationale applies with particular force to the present case.

3. Herring Is Entitled To A New Sentencing Hearing.

As a matter of Florida law, Herring is entitled to a new sentencing hearing. As the United States Supreme Court has recognized, under Florida law, "[i]f the trial court found that some mitigating circumstances exist . . . a "defendant must be resentenced when [the] trial court[] erroneously consider[s] improper aggravating factors." *Barclay v. Florida*, 463 U.S. 939, 954-55, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983). Under such cicumstances, a resentencing is required because

> the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y

> number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Elledge v. State, 346 So.2d 998, 1003 (1977) (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L.Ed.2d 295, 94 S.Ct. 1950 (1974)); *see also Elledge, Id.* ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); *accord Barclay*, 463 U.S. at 963, 103 S.Ct. At 3431-32 (Stevens, J., concurring); *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986) (defendant "entitled to new sentencing hearing in order to satisfy the constitutional safeguards for sentencing in death penalty cases" where trial court erroneously rejected two mitigating circumstances during sentencing phase). Herring's death sentence has therefore been irremediably infected by the erroneous application of the heightened premeditation aggravating circumstance.

B. The Trial Court Committed Clear Error In Summarily Dismissing Herring's *Rogers* Claim.

In summarily dismissing Herring's *Rogers* claim, the trial court simply accepted the State's arguments that this Court's decision in *Eutzy v. State*, 541 So.2d 1143 (Fla. 1989), effectively foreclosed the relief Herring seeks, and that, in any event, Herring's *Rogers* claim was "procedurally defaulted in that it [was] untimely presented in violation" of Rule 3.850. R.O.A. at 100-01. In so holding, the trial court failed to address the constitutional significance of the *Rogers* decision as

applied to Herring, misread this Court's decision in *Eutzy*, and accepted arguments proffered by the State in plain violation of the very procedural default rules -- which apply with equal force to the State -- cited by the trial court in disposing of Herring's claim.

1. The Trial Court Misread *Eutzy* As Foreclosing Herring's *Rogers* Claim; In Fact, *Eutzy* Confirms That Herring Is Now Entitled To Relief.

In its Order summarily dismissing Herring's *Rogers* claim, the trial court did not consider the aberrational nature of the application of the heightened premeditation aggravating circumstance to the facts of Herring's case; it did not consider the numerous indistinguishable cases in which that circumstance was held to be inapplicable; it did not analyze the effect of the *Rogers* holding overruling *Herring I* as applied to Herring himself; it did not even mention the binding United States Supreme Court precedent, including *Cartwright* and *Godfrey*, on point. Instead, the court below merely accepted the State's argument that Herring was not entitled to a benefit of the *Rogers* decision in light of this Court's opinion in *Eutzy*, holding that the "decision in *Rogers* . . ., restricting the applicability of the cold, calculated, and premeditated aggravating factor was not a fundamental change in the law 'should be given retroactive effect' but was a mere 'evolutionary refinement' in the law which should not be utilized to abridge the finality of judgments." R.O.A. at 100-01 (quoting *Eutzy*, 541 So.2d at 1147) (emphasis in original). This holding reflects the trial court's misapprehension of Herring's *Rogers* claim and its misreading of *Eutzy* as dispositive.

In essence, Herring argued below, as he does here, that his death sentence was an aberration in Florida capital

jurisprudence; that is, *Herring I* was a mistake at the time it was decided. The *Rogers* decision, which "expressly overruled the application of [the heightened premeditation] aggravating circumstance under the factual situation set forth in *Herring [I]*," *Herring III*, 528 So.2d at 1178, thus confirmed the aberrational nature of Herring's death sentence.[2] As such, the critical issue before the trial court was not whether *Rogers* applied retroactively to Herring, but rather, whether Herring could remain under a sentence of death imposed on the basis of a statutory aggravating circumstance wrongly applied -- as *Rogers* confirmed -- in the first instance *Eutzy* did not address this question.[3]

Indeed, this Court's decision in *Eutzy* does nothing to diminish Herring's claim that his death sentence is an

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[2] The State argued below that "*Rogers* does not specifically invalidate the cold, calculated, and premeditated murder aggravating factor found established in this case." R.O.A. at 49. This argument obviously is incorrect in light of this Court's unequivocal statement in *Herring III*. It also is contrary to the position taken by the State in federal court: "[B]y virtue of the decision in *Rogers* [citation omitted], one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case." R.O.A. at 41. For reasons discussed more fully in Section I.B.2., *infra*, the State should be barred from denying the validity of Herring's *Rogers* claim.

[3] In his Rule 3.850 motion, Herring argued, in t he alternative, that if *Herring I* was not an aberration, then *Rogers* must be viewed as a fundamental change in Florida law warranting retroactive application. R.O.A. at 15-33. The *Eutzy* Court did not address this alternative question presented in Herring's motion; namely, whether Herring himself -- as opposed to an entire class of capital defendants -- is entitled to retroactive relief in light of this Court's acknowledgment in *Rogers* of the erroneous application of the heightened premeditation aggravating circumstance in *Herring I*. Therefore, Herring maintains that if the decision in *Herring I* was not an aberration, then he, and he alone, is entitled to the retroactive benefit of *Rogers*.

aberration; if anything, *Eutzy* supports Herring's position. In holding that *Rogers* was not a "jurisprudential upheaval" requiring retroactive application to *Eutzy*, 541 So.2d at 1147, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed. Rather, *Rogers* was merely an "evolutionary refinement"in a body of law that had been applied consistently -- with the exception of this case -- since well before the decision in *Herring I*. Under these circumstances, Supreme Court decisions such as *Cartwright* and *Godfrey*, among others, make clear that Herring's death sentence violates the Eighth and Fourteenth Amendments. The trial court's misapprehension of Herring's claim and misreading of *Eutzy* are more than sufficient grounds for reversal.

2. The Trial Court Erred In Failing To Hold The State Procedurally Barred From denying The Validity Or Timeliness Of Herring's *Rogers* Claim.

As noted above, the trial court summarily denied Herring's Rule 3.850 motion "for the reasons set forth in the State's . . . Motion to Strike." R.O.A. at 100. These "reasons" included the State's procedural default argument and its misreading of the *Eutzy* decision. Yet, when the State moved to dismiss Herring's Federal Petition, it argued that (I) the heightened premeditation aggravating circumstance "would seem to have been eliminated in this case;" (ii) Herring "failed to exhaust his available state court remedies" by "never specifically present [ing] to <u>any</u> state court his [Rogers] argument;" and (iii) Herring "could file another Rule 3.850 motion under the authority of *Witt v. State*, 387 So.2d 922 (Fla. 1980) and *Witt v. State*, 465 So.2d 510 (Fla. 1985)." R.O.A. at 41-42.

In short, the State successfully obtained a dismissal of Herring's Federal Petition on the basis of these arguments, then argued below that Herring's current Rule 3.850 motion lacked merit and, in nay event, was time-barred. The State cannot have it both ways. Having invited Herring to litigate his *Rogers* claim in the Florida courts, the State waived its ability to deny the timeliness of Herring's current Rule 3.850 motion or the validity of Herring's claim that his death sentence was an aberration.[4] Under these circumstances, the trial court was obligated, at a minimum, to find Herring's Rule 3.850 motion timely filed, whether because the State was estopped by its conduct in federal court from asserting such a defense.

"Waiver of claims is not a principle that works only to the detriment of petitioners." *Smith v. Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989) (*en banc*) (Kravitch, J., concurring in part and dissenting in part); *see generally Granberry v. Greer*, 481 U.S. 129, 134, 95 L.Ed.2d 119, 107 S.Ct. 1671 (1987) (declining "to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding [a procedural] defense in reserve for use on appeal if necessary"); *Murray v. Carrier*, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986); *Smith v. Murray*, 477 U.S. 527, 91 L.Ed.2d 434, 106 S.Ct. 2661 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). Where, as here, "[t]he state selected its defenses and its arguments . . . it must accept the ramifications

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[4] Of course, the State was free to argue that the *Eutzy* decision foreclosed retroactive application of *Rogers* to Herring, and did so. However, the State was barred from taking contradictory positions in federal and state court with respect the propriety of applying the heightened premeditation aggravating circumstance to the facts of this case, as it also did. *See* n. at 25, *infra*.

of those choices." *Smith v. Zant*, 887 F.2d at 1438 (Kravitch, J., concurring in part and dissenting in part).

In this case, the State should be held to have waived any time-bar objection to Herring's *Rogers* claim in light of the exhaustion defense it asserted in response to Herring's Federal Petition. Indeed, the State affirmatively represented in its motion to dismiss the Federal Petition that Herring's claim was not time-barred. The trial court's failure to acknowledge and enforce the State's waiver was clearly erroneous.

SUPREME COURT OF FLORIDA

Ted HERRING, Appellant,

v. No. 67,524

STATE of Florida, Appellee.

Dec. 30, 1986.

Rehearing Denied March 2, 1987.

Defendant, who had been convicted and sentenced to death for robbing and killing convenience store clerk, moved for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied the motion. Defendant appealed. The Supreme Court held that: (1) defendant's arguments were not proper for postconviction relief motion, and (2) death sentence was proportionate to crime.

Affirmed.

Jeremy G. Epstein, Dennis P. Orr, Kenneth A. Freeling and James P. Bodovitz of Shearman & Sterling, New York City, for appellant.

Jim Smith, Atty. Gen. and Ellen D. Phillips, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals a trial court's denial of his motion for post-conviction relief without an evidentiary hearing under the provisions of Florida Rule of Criminal Procedure 3.850. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

Herring was convicted and sentenced to death for robbing and killing a convenience store clerk. The evidence reflected that Herring shot the clerk once when he perceived a threatening move, and then shot the clerk again "when he hit the ground." This Court affirmed Herring's conviction and sentence in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[1] Herring raises the following multiple issues that could have been raised on appeal: (1) the trial court erroneously applied two statutory aggravating circumstances; (2) the trial court impermissibly counted both the cold, calculated, and premeditated and the elimination of witness aggravating circumstances; (3) the trial judge applied a nonstatutory aggravating factor in sentencing Herring to death; (4) Herring's probation officer should not have been allowed to testify concerning Herring's comment about the victim; (5) the death penalty jury instructions were constitutionally inadequate; (6) the trial judge failed to consider the death sentence's proportionality; (7) the trial court erroneously excluded Herring's proffered mitigating evidence; (8) the trial court applied an incorrect sentencing standard; (9) during the sentencing phase closing arguments, the prosecutor improperly suggested that Herring might be granted parole if given life imprisonment; (10) excluding a prospective juror for cause because of his death penalty views violated the sixth and fourteenth amendments; (11) the state did not prove Herring knowingly and intelligently waived his privilege against self-incrimination and his right to appeal; and, finally, (12) the

trial judge erred by abandoning his duty to review the jury's recommended sentence. We reject all these contentions as improper for a 3.850 motion. As we have previously stated, a 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal. *Sireci v. State*, 469 So.2d 119 (Fla.1985), *cert. denied*, --- U.S. ----, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986); *Jones v. State*, 446 So.2d 1059 (Fla.1984); *Demps v. State*, 416 So.2d 808 (Fla.1982).

[2] Appellant next claims that his sentence is not proportionate, and that *Caruthers v. State,* 465 So.2d 496 (Fla.1985), decided after we affirmed the initial appeal in this case, mandates a life sentence. The state responds that a prior case is not reviewable in light of a subsequent decision, citing *Tafero v. State*, 459 So.2d 1034 (Fla.1984), and *Sullivan v. State*, 441 So.2d 609 (Fla.1983). We do not reach that issue because there are clear distinguishing characteristics between *Caruthers* and *Herring*. Caruthers had no significant history of prior criminal activity, and the sentencing proceeding considered other nonstatutory mitigating factors. Herring, however, had a prior robbery conviction. Additionally, there was evidence that Herring killed the victim to eliminate him as a witness. We hold that Herring's contention on this issue is without merit.

[3] In his next point, Herring contends that an evidentiary hearing was necessary to decide his ineffective-assistance-of-counsel claims. The trial judge, in an extensive order, fully explained why each of the ineffective-assistance-of-counsel claims did not meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Knight v. State*, 394 So.2d 997 (Fla.1981). We agree with the trial judge's findings and commend him for his detailed explanation.

Finally, we reject Herring's claim that our capital sentencing statute is discriminatorily applied. We have rejected this claim in multiple decisions. *Smith v. State*, 457 So.2d 1380 (Fla.1984); *Adams v. State*, 449 So.2d 819 (Fla.1984).

For the reasons expressed, we affirm the trial court's denial of relief.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur.

Supreme Court, U.S.
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CLERK

No. 98-1493

In the

Supreme Court of the United States

OCTOBER TERM, 1998

TED HERRING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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May 25, 1999

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court — in conflict with the United States Court of Appeals for the Second, Third, Fourth, and District of Columbia Circuits — erred in excluding evidence of trial performance in determining whether a death penalty defendant's attorney "actively represented conflicting interests" within the meaning of this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

2. Whether the Florida Supreme Court correctly held — in direct conflict with this Court's decisions in *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Sochor v. Florida*, 504 U.S. 527 (1992) — that it could vacate an aggravating circumstance and impose the death penalty without either reweighing the evidence or conducting a harmless error analysis.

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Ted Herring ("Herring") respectfully requests that this Court summarily reverse the September 24, 1998 and May 2, 1991 decisions of the Florida Supreme Court in this case, upholding the denial of Herring's Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

In the alternative, Herring respectfully petitions this Court for a writ of *certiorari* to review the September 24, 1998 and May 2, 1991 decisions of the Florida Supreme Court in this case, upholding the denial of Herring's Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

JURISDICTION

Petitioner relies upon the statement of Jurisdiction set forth in his initial brief, and, for the reasons set forth below, rejects the State's contention that his petition for writ of *certiorari* to review the May 2, 1991 decision of the Florida Supreme Court is untimely.

STATEMENT OF THE CASE

Petitioner relies upon the Statement of the Case set forth in his petition for writ of *certiorari*.

I. THE FLORIDA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF NUMEROUS OTHER COURTS AND DEMONSTRATES UNCERTAINTY IN THE LOWER COURTS IN THE APPLICATION OF *CUYLER v. SULLIVAN*

In his first claim, Herring argues that the Florida Supreme Court misconstrued this Court's decision in *Cuyler* and ignored the decisions of numerous other courts which have held that counsel's performance at trial is highly relevant in performing a *Cuyler* analysis of actual conflict. *Petition* at 13. The State agrees that a defendant is entitled to relief under *Cuyler* when his counsel (i) had an actual conflict of interest, and (ii) the conflict adversely affected his representation of the defendant. *Id.* The State further concedes that the Florida Supreme Court expressly refused to address, as required by the second prong of the *Cuyler* standard, any aspect of Pearl's performance at trial. *Id.*

Having made these concessions, the State is left only to claim, without elaboration, that the Florida Supreme Court's decision is consistent with *Cuyler* and the four decisions cited in the petition. It does not, however, meet the petitioner's argument that each of these courts recognized that the two parts of the *Cuyler* test "are often intertwined, making the factual analyses of them overlap." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). Hence no proper analysis under *Cuyler* can confine itself to one prong of the test, or wilfully ignore counsel's trial performance. Such ignorance is especially inexplicable where, as here, trial counsel's performance offers the clearest possible demonstration that he was laboring under a conflict between his allegiance to law enforcement and his representation of his client. *Petition* at 6-7.

II. IN UPHOLDING HERRING'S SENTENCE DESPITE THE ELIMINATION OF THE HEIGHTENED PRE-MEDITATION AGGRAVATING CIRCUMSTANCE, THE FLORIDA SUPREME COURT VIOLATED THE EIGHTH AND FOUR-TEENTH AMENDMENTS

A. The Decision Of The Florida Supreme Court Is Indistinguishable From This Court's Decision In *Sochor*

The decision of the Florida Supreme Court in *Herring* is indistinguishable from the Florida Supreme Court decision overturned by this Court in *Sochor v. Florida*, 504 U.S. 527 (1992). As in *Sochor*, Eighth Amendment error occurred when the trial judge weighed the "heightened premeditation" aggravating circumstance in the absence of proof, beyond a reasonable doubt, of "calculation" which consists of a "careful plan or prearranged design to kill." *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987); cf. *Sochor*, 504 U.S. at 540; *Petition* at 19. As in *Sochor*, because

> the Supreme Court of Florida did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained" . . . . the error cannot be taken as cured by the State Supreme Court's consideration of the case.

Sochor, 504 U.S. at 539 (citation omitted). It therefore must follow, as in *Sochor*, that Herring's sentence "cannot stand on the existing record of appellate review." *Id.* at 540. The State wisely — if gracelessly — does not attempt to distinguish *Sochor*. Nor can the State now remedy the Florida Supreme Court's error by describing its decision as a "finding of harmless error," *Respondent's Brief* at 18, when the court itself failed to identify what (if any) type of analysis it purportedly performed. This Court rejected in *Sochor* the State's nearly

identical effort to overcome in its argument on *certiorari* the Florida Supreme Court's "fail[ure] so much as to mention 'harmless error.'" *Sochor*, 504 U.S. at 539-40.

B. Herring Properly Presented His Federal Claims To The Florida State Courts

In complete disregard of the record, the State argues that Herring cannot seek this Court's review of his claim under *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Sochor v. Florida*, 504 U.S. 527 (1992) because "that claim was never raised before the State Courts." *Respondent's Brief* at 17. In fact, the record clearly indicates that Herring challenged the violation of his Eighth and Fourteenth Amendment rights both in his 3.850 Motion to Vacate Sentence, *Appendix* at 1 – 3, and in his appeal to the Florida Supreme Court of the trial court's denial of the 3.850 motion. *Appendix* at 5. During the appeal, the State argued in the alternative that the erroneous application of that aggravating factor was harmless. *Appendix* at 9. In his reply brief, Herring responded to the State's argument — anticipating the issue presently before this Court — by contending that the erroneous application of the heightened premeditation aggravating factor could not be considered harmless error beyond a reasonable doubt, citing *Clemons* for the proposition that "failure to remand to a sentencing jury violates the Constitution 'if the decision is made arbitrarily.'" *Appendix* at 15. Thus, the State's argument is demonstrably false.

C. Final Judgment Was Entered On January 14, 1999 And This Court Has Jurisdiction Over All Federal Questions Decided In All Earlier Stages Of The Litigation

This Court has jurisdiction to review "all of the substantial federal questions determined in the earlier stages of the litigation" by the Florida Supreme Court. *Reece v. Georgia*, 350 U.S. 85, 87 (1955). There was nothing "bizarre" about the facts in *Reece*, as the State now asserts without explanation, *Respondent's Brief* at 18, and this Court did not limit its holding in *Reece* to those facts. Moreover, *certiorari* could not have been obtained earlier, because the Florida Supreme Court's June 12, 1991 denial of rehearing was not a final judgment as of that date within the meaning of 28 U.S.C. § 1257. In general, this Court's final judgment rule

> preclude[s] reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). There can be little doubt that the State would have invoked this rule had Herring sought *certiorari* review in 1991.

However, Herring's case would not have qualified for an exception to the final judgment rule in 1991. As the State's own authority, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), makes clear, "[i]n most, if not all" of the cases in which an exception to the final judgment rule was found, "additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date . . ." *Cox*, 420 U.S. at 477. Indeed, as the Court observed in *Flynt v. Ohio*, 451 U.S. 619 (1981), *certiorari* is inappropriate where "it appears that [on remand] other federal issues will be involved in the trial court . . .," and "there is no identifiable federal policy that will suffer if the state criminal

proceeding goes forward." *Id.* at 621-22. Because the judgment of the Florida Supreme Court did not become final until, after an eight-year delay, that court decided all aspects of petitioner's original appeal, the State's contentions present no obstacle to this Court's exercise of jurisdiction over both of Herring's constitutional claims.

CONCLUSION AND REQUEST FOR SUMMARY REVERSAL

Because the State has failed to address the merits of Herring's claims, and because the State's procedural contentions are unavailing, petitioner requests summary reversal of the judgment below. *See, e.g., Espinosa v. Florida*, 505 U.S. 1079 (1992). In the alternative, and for the foregoing reasons, petitioner Ted Herring's petition for a writ of certiorari should be granted.

Dated: May 25, 1999

Respectfully submitted,

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APPENDIX

STATE OF FLORIDA

v.

TED HERRING

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO.: 81-1957-C

MOTION TO VACATE SENTENCE

1. The Decision In *Rogers v. State* Is A Constitutional Change In Law

29. First, *Rogers* was a "constitutional change of law," as required by *Witt*. The United States Supreme Court has made clear that, as a matter of federal consitutional law, a state court's construction of its aggravating factors must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983). Just recently, in *Maynard v. Cartwright*, ___ U.S. ___, 108 S. Ct. 1853 (1988), the United States Supreme Court reemphasized that a death sentence cannot stand where a state court fails to apply a limiting construction of a broadly worded aggravating factor in order to channel and narrow those cases that will be subject to the death penalty. On its face, the heightened premeditation aggravating circumstance is so broad as to encompass, potentially, *any* premeditated murder. However, the United States Supreme Court has made clear that there must be a "narrowing principle" that will focus and limit the breadth of a factor that would otherwise be unconstitutionally vague and overboard. *Cartwright*, 108 S. Ct. at 1859; *see also Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759 (1980).

30. For this fundamental reason, the decision in *Rogers* is one of vital constitutional importance, because it ensures the legality — under the Eighth and Fourteenth Amendments to the United States Constitution — of the heightened premeditation aggravating circumstance. Without a limiting construction of this sort, the factor would be subject to constitutional attack under *Cartwright* and *Godfrey*. This was no mere "evolutionary refinement" in the law, *Witt*, 387 So. 2d at 929; it was a critical, constitutionally compelled narrowing of a potentially overinclusive and therefore potentially unlawful aggravating factor. *See Herring I*, 446 So. 2d at 1058 (Ehrlich, J., concurring in part, dissenting in part) (the majority holding "bring[s] into question the constitutionality of [the heightened premeditation] aggravating factor and, perhaps, the constitutionality, *as applied*, of Florida's death penalty statute") (emphasis in original).

II. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth and Fourteenth Amendments

38. While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 104 S. Ct. 3154, 3162 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 102 S. Ct. 869, 874 (1982) (emphasizing the "twin objectives" of "measured, consistent application and fairness to the accused").

39. Thus, even a carefully designed capital sentencing statute violates the Eighth and Fourteenth Amendments if it is applied so that the cases in which the death penalty is imposed are indistinguishable from the cases in which it is not. *Spaziano*, 468 U.S. at 460, 104 S. Ct. at 3162 (citing *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733). Accordingly, the

Supreme Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Cartwright*, 108 S. Ct. at 1858 (citations omitted).

40. Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1764 (quoting *Gregg*, 428 U.S. at 196 n. 47, 96 S. Ct. at 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Cartwright*, 108 S. Ct. at 1859 (citing *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765).

41. Herring's death sentence plainly violates these constitutional requirements — a fact which the Supreme Court of Florida has implicitly acknowledged in *Rogers*, 511 So. 2d at 533. In *Rogers*, the Florida Supreme Court recognized that it had erred in deciding Herring's direct appeal, and overruled that decision. *Id. Rogers* makes clear that Herring's death sentence was improper at the time it was imposed.

42. The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> [t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla. Stat. Ann. § 921.141(5)(i) (West Supp. 1984).

No. 75,209

In the

Supreme Court of Florida

TED HERRING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

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ARGUMENT

I.

THE ERRONEOUS APPLICATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE REQUIRES VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

Herring I has now been explicitly overruled by *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988) ("Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question."); *see Herring III*, 528 So. 2d at 1178 ("Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*.") (citations omitted). *Rogers* and *Herring III* confirm that Herring is now entitled to relief on the merits of this claim.

2. The Application Of The Heightened Premeditation Aggravating Circumstance Is An Error of *Constitutional Dimension*

While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 82 L. Ed.2d 340, 104 S. Ct. 3154 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 71 L. Ed.2d 1, 102 S. Ct. 869 (1982).

Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L. Ed.2d 398, 100 S. Ct. 1759 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47, 96 S. Ct. at 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Maynard v. Cartwright*, 486 U.S. 356,100 L. Ed.2d 372, 108 S. Ct. 1853 (1988) (citing *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765).

In *Cartwright*, 486 U.S. at 356, the Court unanimously affirmed the *vacatur* of a death sentence based on the erroneous application of a statutory aggravating circumstance. At issue was Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. Relying on *Godfrey*, the Court concluded that the Oklahoma Court of Criminal Appeals had "failed to apply its previously recognized limiting construction of the aggravating circumstance," and that, as a result, "there was 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Cartwright*, 486 U.S. at 363, 108 S. Ct. at 1859 (quoting *Godfrey*, 446 U.S. at 433, 100 S. Ct. at 1767). The Court concluded that the application of the aggravating circumstance to the facts of *Cartwright* "without some narrowing principle to apply to those facts" violated the Eighth Amendment. *Id.*

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002, 78 L. Ed.2d 697, 104 S. Ct. 508 (1983), the Eleventh Circuit vacated a death sentence on the basis of, among other things, the erroneous application of Florida's "heinous, atrocious, and cruel" aggravating circumstance, as well as the state's "risk of death to many persons" aggravating factor. Relying on *Godfrey*, the court held that "[a]pplication of [these] aggravating factor[s] to the facts

of this case is not only inconsistent with the Florida Supreme Court's construction of the provision[s]; it also reflects an absence of control or guidance of the sentencing judge's discretion." 685 F2d at 1265-66. The court concluded that the erroneous application of the statutory aggravating circumstances "suggests no 'inherent restraint on the arbitrary and capricious infliction of the death sentence,'" and therefore, violated the Eighth Amendment. *Id.* at 1264-65 (quoting *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1764).

As the Eleventh Circuit later explained in *Hargrave v. Wainwright*, 804 F.2d 1182, 1194 (11th Cir.), *rehearing en banc granted and vacated on other grounds*, 809 F.2d 1486 (11th Cir. 1986):

> In sum, the state reviewing courts in both *Proffitt* and *Godfrey* failed to give any explanation or set forth any facts upon which the courts justified their findings of the particular aggravating circumstance under review. *Moreover, upon an independent examination of the record, neither this circuit in Proffitt nor the Supreme Court in Godfrey could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstances to apply.*

Id. (emphasis supplied). This rationale applies with particular force to the present case.

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Herring next claims he is entitled to a new sentencing hearing because the trial court considered an improper aggravating factor. This argument is without merit since no aggravating factor was improperly considered, and even if it were, the sentence of death would remain. *See Clemons v. Mississippi*, 4 F.L.W. Fed. S224 Case No. 88-6873 (March 28, 1990). In *Herring v. Dugger*, 528 So.2d 1176, 1178-79 (Fla. 1988), Herring challenged the effectiveness of appellate counsel for failing to prevail on the cold and calculated aggravating circumstance issue. This court rejected that claim, finding not only that counsel's performance was not deficient, but also that there was no showing that the alleged deficiency would have changed the outcome. The state submits that implicit in this court's ruling was the ruling that even if the CCP factor were stricken the death penalty is appropriate where there are three weighty aggravating factors and one arguable statutory mitigating factor, age; and nonstatutory mitigation that Herring had a difficult childhood. Even if an aggravating factor is stricken, the death penalty should be imposed. *See Rogers v. State*, 511 so.2d 526 (Fla. 1987); *Rivera v. State*, 545 So.2d 864 (Fla. 1989); *Lusk v. State*, 446 So.2d 1038 (Fla. 1984); *Jackson v. State*, 530 So.2d 269 (Fla. 1988). This is particularly true where age is not necessarily a mitigating factor, *Lamb v. State*, 532 So.2d 1051 (Fla. 1988), and the nonstatutory mitigating factors do not mitigate the crime. *See Rogers*, *supra* at 534. The trial court found that the mitigation was not sufficient to block imposition of the death penalty where a defendant with a prior violent felony conviction murders an innocent clerk during a robbery so the clerk will not testify against him. Error, if any, was harmless beyond a reasonable doubt and would not change the trial court's opinion. *Rogers*, *supra* at 535; *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

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ARGUMENT

I.

HERRING I HAS BEEN "EXPRESSLY OVERRULED," THUS REQUIRING, UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

The State devotes much of its Answer Brief to the remarkable proposition that *Herring I* has not been overruled, AB at 10-15, notwithstanding this Court's clear holdings to the contrary. In *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L. Ed. 2d 681, 108 S. Ct. 733 (1988), this Court held that "[s]ince we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question." Even if there were some doubt as to the meaning of this holding, the Court unambiguously restated the result of *Rogers* in *Herring III*: "Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and *expressly overruled* the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*." *Herring v. Dugger*, 528 So. 2d 1176, 1178 (Fla. 1988) (citations omitted) (emphasis supplied). It cannot seriously be disputed that *Herring I* has now been overruled.

Indeed, the State *did not* dispute that fact in litigating Herring's Federal Petition for a Writ of *Habeas Corpus*. To the contrary, the State, in its response to Herring's Federal Petition, conceded that

> by virtue of the decision in *Rogers*, one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case.

R.O.A. at 41.

Under these circumstances, the State's further contention that the heightened premeditation aggravating circumstance was applied properly to the facts of this case is demonstrably false. All of the surrounding circumstances indicated that the shooting was an accident. At trial, the State offered no evidence to refute Herring's statement that he shot the clerk "by mistake." In his confession, Herring admitted to four other armed robberies in the same time period; he never fired his gun or harmed anyone during any of these incidents. Indeed, prior to his arrest, he had never been convicted, or even accused, of any violent crime. In light of *Rogers* and *Herring III*, it is clear that the heightened premeditation aggravating circumstance could not be applied in any future case involving facts identical to those in *Herring I*; put another way, if the State presented precisely the same evidence at Herring's resentencing hearing, the trial court could not impose a sentence of death on the basis of this aggravating circumstance.

For these reasons, the State's reliance upon *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989), is misplaced. In *Eutzy*, this Court held that its decision in *Rogers* was not a fundamental change in the law which "should be given retroactive effect," but was a mere "evolutionary refinement" in the law of the heightened premeditation aggravating circumstance. 541 So. 2d at 1147; *see also Harich v. State*, 542 So. 2d 980, 982 (Fla. 1989). Here, Herring does not seek the retroactive benefit of *Rogers*. In essence, Herring claims the precise opposite: in holding that *Rogers* was not a "jurisprudential upheaval" requiring retroactive application, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed; *Rogers* was merely an "evolutionary refinement" in a body of law that had been applied consistently — with the

exception of this case — since well before the decision in *Herring I*. *See* IB at 13-18 (citing cases). Thus, if anything, *Eutzy* supports Herring's position.

As Herring demonstrated in his Initial Brief, United States Supreme Court decisions such as *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed.2d 372, 108 S. Ct. 1853 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 429, 64 L.Ed. 2d 398, 100 S. Ct. 1759 (1980), are controlling here.* In overruling *Herring I*, this Court recognized that, like the Oklahoma courts in *Cartwright*, it "failed to apply its previously recognized limiting construction of [the heightened premeditation] aggravating circumstance." *Cartwright*, 486 U.S. at 363, 108 S. Ct. at 1859. However, the mere acknowledgment of error, without eliminating the heightened premeditation aggravating circumstance which formed a critical basis for Herring's death sentence, does not satisfy well-established constitutional standards. Under *Cartwright* and *Godfrey*, Herring's sentence violates the Eighth Amendment because this Court applied a statutory aggravating circumstance to the facts of this case "without some narrowing principle to apply to those facts," and thus, "there [is] 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Id.* (citations omitted).

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* In this regard, the State's reliance upon *Brown v. State*, 15 F.L.W. S165 (Fla. Mar. 22, 1990), is unavailing. In *Brown*, this Court concluded that the heightened premeditation aggravating circumstance was applied correctly and in accordance with *Rogers*, and rejected defendant's contention that that aggravating circumstance was unconstitutionally vague under *Cartwright*. Thus, *Brown* did not address the legality of a death sentence where, as here, the state courts failed to apply their "previously recognized limiting construction" of the heightened premeditation aggravating circumstance, nor may *Brown* reasonably be read as holding that the *Cartwright/Godfrey* principle is applicable only to this state's "heinous, atrocious, and cruel" aggravating factor.

B. Herring Is Entitled To A New Sentencing Hearing Because The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Was Not Harmless Beyond A Reasonable Doubt

The State argues alternatively that the erroneous application of that aggravating factor was harmless. In essence, the State contends that this Court's refusal to reach the question of retroactivity in *Herring III* should be read as an implicit finding that the error committed in *Herring I* was harmless. No fair reading of *Herring III* warrants this conclusion.

The State concedes, as it must, that this Court refused to reach the issue of the retroactive application of *Rogers*, or the merits of Herring's claim regarding the erroneous application of the heightened premeditation aggravating circumstance, in *Herring III*. AB at 14. Indeed, the State specifically made the point in opposing Herring's Federal Petition, arguing that Herring's *Rogers* claim had "yet to be presented to any state court." R.O.A. at 41. Thus, in *Herring III*, this Court did not address its acknowledgment in *Rogers* of its error in *Herring I*, and certainly did reach the question of whether that error was harmless, implicitly or otherwise.

Nor can the error at issue be considered harmless beyond a reasonable doubt. At trial, the jury recommended the death sentence by a vote of 8 to 4. Elimination of the heightened premeditation aggravating circumstance, which formed a critical basis for both the State's case at sentencing and the trial court's ultimate sentencing determination, almost certainly would have affected, if not altered, the outcome of Herring's sentencing hearing. The presence of two substantial mitigating factors — Herring's age at the time of the offense and his difficult life as a child and young adult — reinforces the conclusion. *Cf. Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988) (citing *Herring I*).

Herring is entitled to a new sentencing hearing as a matter of law. See *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977) ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L. Ed.2d 295, 94 S. Ct. 1950 (1974). Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," *Elledge*, 346 So. 2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. *See, e.g., Peavy v. State*, 442 So. 2d 200, 203 (Fla. 1983) (new sentencing hearing required where elimination of heightened premeditation aggravating circumstance left "three aggravating factors to be weighed against two mitigating factors"); *Dudley v. State*, 545 So. 2d 857, 860 (Fla. 1989) (new sentencing hearing ordered where elimination of heightened premeditation aggravating circumstance left three aggravating factors and one mitigating factor). The result here should be no different. *Cf. Clemons v. Mississippi*, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

C. Herring's Claim Relating To The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Is Neither Procedurally Barred Nor An Abuse Of Process

The State's final contention, that "[s]ince the validity of the [heightened premeditation aggravating circumstance] was raised in prior post-conviction motions, the reassertion of the claim is an abuse of process" and is procedurally barred, AB at 15, is also incorrect. In essence, the State argues that since Herring has diligently asserted this claim, only to be denied relief on the basis of error this Court has now acknowledged, Herring should be procedurally barred from seeking the relief to which he indisputably is entitled. Herring respectfully submits that procedural rules and defenses are inapplicable to the unique circumstances of this case: Herring cannot be faulted — let alone penalized — for failing to have convinced the courts of this state of an error this Court subsequently has acknowledged.

Herring raised the issue of the improper application of the heightened premeditation aggravating circumstance in his initial 3.850 Motion. At that time, the State argued, and this Court agreed, that the issue was procedurally barred because it was raised on direct appeal. *Herring II*, 501 So. 2d at 1280. The State's argument now, apparently, is that Herring is still barred even though on direct appeal the issue was decided wrongly. Such an argument is not only absurd; it makes a mockery of the principles of due process and fairness that must underlie any rational criminal justice system. *Cf. Sanders v. United States*, 373 U.S. 1, 8, 10 L. Ed. 2d 148, 83 S. Ct. 1068, 1073 (1963) ("[c]onventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged").

Moreover, as Herring pointed out in his Initial Brief, the State's invocation of procedural bar flies directly in the face of the State's position in opposing Herring's Federal Petition; namely, that in light of *Rogers*, "the issue of whether the trial court would have, or could have, still imposed that same sentence has yet to be presented to any state court." R.O.A. at 41. Thus, even if procedural defenses could properly be invoked in this case — which they cannot — the State has waived such defenses. *See Smith v.Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989) (*en banc*) (Kravitch, J., concurring in part and dissenting in part) ("The state selected its defenses and its arguments . . . it must accept the ramifications of those choices. Waiver of claims is not a principle that works only to the detriment of petitioners.").